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Report of the United Nations Commission on International Trade Law

Forty-eighth session
(29 June-16 July 2015)

General Assembly

Official Records
Seventieth session
Supplement No. 17

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-eighth session of the Commission, held in Vienna from 29 June to 16 July 2015.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The forty-eighth session of the Commission was opened on 29 June 2015.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 3 November 2009, on 15 April 2010, on 14 November 2012 and on 14 December 2012 are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Czech Republic (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009, two were elected by the Assembly at its sixty-fourth session, on 15 April 2010, 29 were elected by the Assembly at its sixty-seventh session, on 14 November 2012, and one was elected by the Assembly at its sixty-seventh session, on 14 December 2012. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Poland (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019).

5. With the exception of Armenia, Botswana, Cameroon, Côte d'Ivoire, Fiji, Gabon, Jordan, Kuwait, Liberia, Mauritania, Mauritius, Namibia, Nigeria, Paraguay, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Belgium, Benin, Bolivia (Plurinational State of), Chile, Costa Rica, Cyprus, Dominican Republic, Egypt, Finland, Lebanon, Luxembourg, Mali, Netherlands, Norway, Oman, Peru, Portugal, Qatar, Romania, Slovakia, Sri Lanka, Tunisia, United Arab Emirates and Viet Nam.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID), United Nations Conference on Trade and Development (UNCTAD) and World Bank;

(b) *Intergovernmental organizations*: Energy Charter Secretariat, the Hague Conference on Private International Law, International Institute for the Unification of Private Law (Unidroit), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Bar Association (ABA), American Society of International Law, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), EU Federation for the Factoring and Commercial Finance (EUF), European Law Institute (ELI), European Law Students' Association, Factors Chain International (FCI), Fondation pour le droit continental, Forum for International Conciliation and Arbitration (FICACIC), German Institution of Arbitration (DIS), International Association of Democratic Lawyers (IADL), International Bar Association (IBA), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCC), International Council for Commercial Arbitration (ICCA), International Factors Group (IFG), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Law Institute (ILI), International Mediation Institute (IMI), International Swaps and Derivatives Association (ISDA), Internet Corporation for Assigned Names and Numbers (ICANN), Korean Commercial Arbitration Board (KCAB), Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT), Swiss Arbitration Association (ASA) and Vienna International Arbitral Centre (VIAC).

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

10. The Commission elected the following officers:

Chair:	Mr. Francisco REYES VILLAMIZAR (Colombia)
Vice-Chairs:	Mr. Yongil LEE (Republic of Korea) Mr. Michael Adipo Okoth OYUGI (Kenya) Mr. Michael SCHNEIDER (Switzerland)
Rapporteur:	Mr. Siniša PETROVIC (Croatia)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 998th meeting, on 29 June, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of issues in the area of arbitration and conciliation:
   (a) Consideration and provisional approval of draft revised UNCITRAL Notes on Organizing Arbitral Proceedings;
   (b) Enforcement of settlement agreements resulting from international commercial conciliation/mediation;
   (c) Possible future work in the area of arbitration and conciliation;
   (d) Establishment and functioning of the transparency repository;
   (e) International commercial arbitration moot competitions.
5. Consideration of issues in the area of security interests:
   (a) Consideration and provisional approval of parts of a model law on secured transactions;
   (b) Possible future work in the area of security interests;
   (c) Coordination and cooperation in the area of security interests.
6. Micro-, small- and medium-sized enterprises: progress report of Working Group I.
7. Online dispute resolution: progress report of Working Group III.
8. Electronic commerce: progress report of Working Group IV.

9. Insolvency law: progress report of Working Group V.

10. Endorsement of texts of other organizations: Principles on Choice of Law in International Commercial Contracts.

11. Technical assistance to law reform.

12. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts:

    (a) Case law on UNCITRAL texts (CLOUT);

    (b) Digests of case law relating to UNCITRAL legal texts.

13. Status and promotion of UNCITRAL legal texts.

14. Coordination and cooperation:

    (a) General;

    (b) Reports of other international organizations;

    (c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.

15. UNCITRAL regional presence.

16. Role of UNCITRAL in promoting the rule of law at the national and international levels.

17. The thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

18. Work programme of the Commission.

19. Relevant General Assembly resolutions.

20. Other business.

21. Date and place of future meetings.

22. Adoption of the report of the Commission.

E. Establishment of a Committee of the Whole

12. The Commission established a Committee of the Whole and referred to it for consideration under agenda item 5 (a). The Commission elected Mr. Rodrigo LABARDINI FLORES (Mexico) to chair the Committee of the Whole in his personal capacity. The Committee of the Whole met from 13 to 16 July and held 7 meetings. At its 1023rd meeting, on 16 July, the Commission considered and adopted the report of the Committee of the Whole and agreed to include it in the present report (see para. 214 below). (The report of the Committee of the Whole is reproduced in paras. 169-213 below).

F. Adoption of the report

13. The Commission adopted the present report by consensus at its 1006th and 1007th meetings on 3 July, 1014th and 1015th meetings on 10 July, 1016th meeting on 13 July and 1023rd meeting on 16 July 2015.

III. Consideration of issues in the area of arbitration and conciliation

A. Consideration and provisional approval of draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

1. Introduction

14. The Commission recalled its decision at the forty-sixth session, in 2013, that Working Group II (Arbitration and Conciliation) should undertake work on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings[2] (referred to as the "Notes").[3] At that session, it was agreed that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of the Notes would be preserved.[4] The Commission further recalled that, at its forty-seventh session, in 2014, it agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second session, the revision of the Notes. In so doing the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[5]

15. At its current session, the Commission had before it the reports of Working Group II on the work of its sixty-first session, held in Vienna from 15 to 19 September 2014, and its sixty-second session, held in New York from 2 to 6 February 2015 (A/CN.9/826 and A/CN.9/832, respectively). It also had before it the text of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (the "draft revised Notes") as contained in document A/CN.9/844.

16. The Commission took note of the summary of the deliberations on the draft revised Notes that had taken place at the sixty-first and sixty-second sessions of the Working Group. The Commission considered the draft revised Notes, with the aim of their provisional approval at its current session, and adoption at its next session, in 2016. In so doing the Commission agreed to address substantive matters in relation to the revision of the Notes, entrusting the Secretariat with any consequential drafting modifications.

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[2] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[3] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[4] Ibid.

[5] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

2. Consideration of the draft revised Notes

(a) General remarks

17. The Commission recalled that, when it finalized the Notes at its twenty-ninth session, in 1996, it approved the principles underlying the Notes, among which were: that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices and, in the face of such disparate practices, to recommend the use of any particular procedure.[6] It was furthermore recalled that one of the great advantages of the Notes was their descriptive and non-directive nature that reflected a variety of practices.

18. The Commission agreed that the draft revised Notes should retain those characteristics and that their purpose should not be to promote any practice as best practice.

19. Further, the Commission confirmed the understanding of the Working Group that the draft revised Notes should maintain their general applicability and address procedural issues that might arise, without differentiating the types of arbitration. In that context, the Commission noted that draft Note 6 addressing "information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration" highlighted a specific issue that might arise in relation to investment arbitration, while still preserving the general nature of the draft revised Notes.

20. The Commission also confirmed the understanding of the Working Group that references to technology and means of communication in the draft revised Notes needed to be updated using language that would not be technology-specific (A/CN.9/826, paras. 25, 38, 39, 91 to 102, 110 and 125). It was also noted that new topics had been covered under the draft revised Notes in relation to interim measures, joinder and consolidation.

21. As a matter of drafting, the Commission agreed that terms should be used in a consistent manner in the next version of the draft revised Notes. For instance, it was said that the term "document" which was used in a general manner sometimes referred specifically to "documentary evidence", sometimes to "written submissions", and sometimes to "copies of legal authorities" and that these distinct meanings should be clarified in the relevant paragraphs of the draft revised Notes, whose scope would otherwise be unclear. Furthermore, it should be clarified whether the term "witnesses" referred to witnesses of facts, expert witnesses or both.

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[6] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), para. 13.

(b) Comments on paragraphs of the draft revised Notes

Introduction (paras. 1 to 16)

Paragraph 13 of the draft revised Notes

22. The Commission approved the suggestion that the word "usually" should be added before the word "desirable" in the last sentence of paragraph 13 to reflect the exceptional circumstance in which the participation of the parties themselves would not be desirable.

Paragraph 14 of the draft revised Notes

23. It was said that paragraph 14 clarified an important procedural matter in relation to the situation where a party did not participate in procedural meetings. It was suggested that the arbitral tribunal, even under such circumstances, should always provide the parties with an opportunity to present their case. Therefore, the Commission agreed to delete the words "possibly in the procedural timetable" from that paragraph, and to add a separate sentence reflecting the fact that if a procedural timetable was established, that timetable should be adjusted to provide for such opportunity.

24. A suggestion was made to reflect the need to adjust the procedural timetable in situations of joinder and consolidation. That suggestion did not receive support as joinder and consolidation usually did not occur after the constitution of the arbitral tribunal and as that matter was adequately addressed in paragraphs 12 and 14 of the draft revised Notes.

Paragraph 15 of the draft revised Notes

25. The Commission agreed to add the word "also" before the words "be made orally" in the second sentence of paragraph 15 to better reflect the various forms decisions made at procedural meetings might take.

26. In order to reflect practice, it was agreed that a sentence along the following lines could be added to paragraph 15: "For instance, it is common for an arbitral tribunal to summarize the decisions taken at the first procedural meeting in a procedural order setting forth the rules governing the arbitration." The Commission further agreed that where the draft revised Notes referred to matters to be considered at the outset of the proceedings, a cross-reference to paragraph 15 should be added.

Annotations

Note 1 — Set of arbitration rules (paras. 17 to 19)

Paragraph 17 of the draft revised Notes

27. A suggestion was made that the fourth sentence of paragraph 17 should be revised to provide that the set of arbitration rules chosen by the parties would govern the arbitration "subject to the mandatory provisions of the applicable arbitration law", instead of focusing on the prevalence of the set of arbitration rules over non-mandatory provisions of that law.

28. In response, it was noted that the general principle of the agreement of the parties being subject to the mandatory provisions of the applicable arbitration law was already stated in paragraphs 5 and 6 of the draft revised Notes, and that the purpose of the fourth sentence of paragraph 17 was to highlight that party autonomy prevailed over any non-mandatory provisions of the applicable arbitration law, a principle also reflected in article 1, paragraph 1, of the UNCITRAL Arbitration Rules (as revised in 2010).[7]

29. After discussion, the Commission agreed to retain the fourth sentence of paragraph 17 without modification and to replace the words "may be better adapted to a particular case" in the last sentence of that paragraph by words along the following lines: "may better reflect the objectives of the parties".

Paragraph 18 of the draft revised Notes

30. It was noted that paragraph 17 dealt with circumstances where there existed an agreement on a set of arbitration rules prior to the commencement of the arbitration and that no reference was made to the form of that agreement. It was stated that, in contrast, the first sentence of paragraph 18 referred to stipulation in the form of an "arbitration agreement", which was too specific. It was suggested that paragraph 18 should apply generally to situations where the parties had not agreed on a set of arbitration rules.

31. With respect to the second sentence of paragraph 18, a question was raised whether that provision was intended to also address situations where parties would agree on an arbitral institution to administer a case under a set of arbitration rules other than the rules of that institution. It was suggested that if that were to be the case, the words "ad hoc" should be deleted as those words could be misunderstood to limit such possibility.

32. It was generally agreed that the objective of paragraph 18 was to indicate that the parties would need to secure the agreement of the arbitral institution, in particular if the arbitral tribunal was already constituted. It was recalled that at the sixty-first session of the Working Group, concerns were expressed with respect to including in the draft revised Notes the practice of using institutional rules without the arbitration being administered by that institution, as such practice often led to confusion, delays and costs (A/CN.9/826, para. 45). Therefore, it was agreed that the draft revised Notes would not need to elaborate further on such possibility. It was further suggested that the words "regardless whether the arbitration is administered under the arbitration rules of that institution or under the UNCITRAL Arbitration Rules, or any other ad hoc rules" could be deleted as they were redundant.

33. As a matter of clarification, it was agreed that the second sentence of paragraph 18 should be revised along the following lines: "If the parties agree after the arbitral tribunal has been constituted that an arbitration institution will administer the dispute, it may (...)".

[7] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

Paragraph 19 of the draft revised Notes

34. The Commission agreed that paragraph 19 should be revised to indicate that the arbitral tribunal, in determining how the proceedings would be conducted, might refer to a set of arbitration rules.

Note 2 — Language or languages of the arbitral proceedings (paras. 20 to 25)

Paragraph 20 of the draft revised Notes

35. In relation to the second sentence of paragraph 20, the Commission agreed that reference should be made to the parties having the capacity or being at ease to understand or communicate in, rather than being "familiar" with, the language of the proceedings.

Paragraph 22 of the draft revised Notes

36. It was suggested that paragraph 22 should clarify the possibility of translating only part of relevant documents, including in the case of voluminous judicial decisions and juridical writings (legal authorities).

37. In that context, it was agreed that the draft revised Notes should address issues related to legal authorities in a general manner (for example, indicating that submission of case law might not be necessary where the arbitrators were familiar with it).

Note 3 — Place of arbitration (paras. 26 to 30)

Paragraph 27 of the draft revised Notes

38. The Commission agreed to broaden the list of legal consequences of the choice of the place of arbitration, to include matters such as the impact on the appointment of arbitrators, requirements in relation to the signing of the awards. More generally, it was agreed to provide that arbitrators and parties should make themselves acquainted with the arbitration law at the place of arbitration.

39. A suggestion that the draft revised Notes should contain a general reference to the law applicable to the merits of the case did not receive support, as it was considered that that question was outside the scope of the draft revised Notes, which focused on procedural aspects.

Paragraphs 28 and 29 of the draft revised Notes

40. The Commission approved the suggestion that the qualification restrictions with respect to counsel representation referred to in paragraph 29 (iv) could also constitute a relevant criteria under paragraph 28, as that matter might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award. Along the same lines, it was suggested that applicable arbitration law might include restrictions on the qualification of arbitrators, and that that question might also deserve consideration under paragraphs 28 and 29. It was stated, however, that the law governing the place of arbitration did not apply with respect to the qualification of the arbitrators in international arbitration.

Paragraph 30 of the draft revised Notes

41. In relation to paragraph 30, it was suggested that parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions.

42. The Commission confirmed the understanding that the words "expeditious and convenient" in paragraph 30 were broad enough to cover situations where, for reasons of force majeure, hearings could not be held at the place of arbitration.

Note 4 — Administrative support that may be needed for the arbitral tribunal to carry out its functions (paras. 31 to 37)

Paragraph 33 of the draft revised Notes

43. It was agreed that the first sentence of paragraph 33 should read along the following lines: "Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal". It was explained that such support or services might not necessarily be available from all arbitration institutions.

Paragraph 35 of the draft revised Notes

44. In relation to the last sentence of paragraph 35 which provided that "In any event, secretaries would normally not be involved in the arbitral tribunal's decision-making functions", a wide range of views were expressed.

45. One view was that the present text correctly reflected the current practice where the arbitral tribunal would normally be making decisions while, in certain rare instances, secretaries could be tasked with providing legal advice. Reference was made to rules and practices in relation to certain types of arbitration, like commodity arbitration, or arbitration in specific sectors, where a secretary to the arbitral tribunal might be the only person with legal background tasked with functions that might have an impact on the decision-making process. Therefore, it was suggested that the present text should be retained, possibly with additional clarifications.

46. Another view was that the word "normally" could be misleading as it was generally understood that a secretary should not be involved in the decision-making process. Accordingly, the suggestion was made that the original wording used in paragraph 27 of the Notes would be more appropriate, which read: "However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal."

47. Recalling the non-prescriptive nature of the draft revised Notes, another suggestion was to state the principle that the arbitral tribunal was tasked with the decision-making function, without any reference to secretaries. In that context, yet another suggestion was that if that general principle were to be stated, the revised draft Notes should make it clear that the secretaries in certain types of arbitration would not be prevented from providing legal advice to the arbitral tribunal.

48. After discussion, the Commission decided to consider the issue further at a later stage of its deliberations.

Note 5 — Cost of arbitration (paras. 38 to 47)

Paragraphs 38 to 40 of the draft revised Notes

49. In relation to paragraph 38, it was highlighted that the determination of the arbitral tribunal with respect to the cost of arbitration would in some cases be restricted (for example, when the fees and expenses of the arbitral tribunal were set by the arbitration institution). Moreover, it was stated that the arbitral tribunal would have no control over the legal costs incurred by the parties. It was further stated that in any case, determination of cost by the arbitral tribunal would be limited to recoverable costs. A number of suggestions were made that the draft revised Notes should emphasize and elaborate further on the meaning of "reasonableness" not only with respect to cost and fees of the arbitral tribunal, but also with respect to whether a party was entitled to compensation for all or some of its cost. It was also stated that the arbitral tribunal should set out the standards of reasonableness with respect to cost and its allocation at the outset of the proceedings.

50. After discussion, it was agreed that paragraphs 38 to 40 should be recast to clearly set out the elements or items of cost of arbitration and then state that it would be the arbitral tribunal's responsibility to ensure the reasonableness of such cost, regarding both the fees and expenses of the arbitrators and allocation of recoverable cost.

Paragraph 41 of the draft revised Notes

51. It was agreed that the order of the first two sentences of paragraph 41 should be reversed to first provide that parties would normally be requested to deposit an amount to cover costs, and then address instances where such deposit would not be handled by an arbitral institution and thus would need to be taken care of by the arbitral tribunal.

Paragraphs 45 and 46 of the draft revised Notes

52. The Commission heard various proposals in relation to paragraphs 45 and 46. It was suggested that the emphasis should be on the discretionary power of the arbitral tribunal to decide on cost allocation. It was further said that the legal basis for an arbitral tribunal to make a decision on cost allocation should be reflected in those paragraphs by including references to the applicable arbitration law, arbitration rules and agreement of the parties. It was further underlined that there were various practices in relation to methods for allocating costs.

53. After discussion, the Commission agreed that it would be useful to provide more information to arbitral tribunals in relation to cost allocation and that reference should be made to the widely applied principle of "cost follow the event". It was also agreed that paragraph 46 should be redrafted along the following lines: "The arbitral tribunal may also wish to consider the conduct of the parties in applying any allocation method agreed by the parties or specified by the applicable arbitration law or arbitration rules, or in the absence of such agreement or specification, in applying such other method as the arbitral tribunal deems appropriate. Conduct so considered might include a failure to comply with procedural orders or abusive procedural requests (for example, document requests, procedural applications and cross-examination requests) to the extent that they actually had a direct impact on

the cost of arbitration and are determined by the arbitral tribunal to have unnecessarily delayed or obstructed the proceedings." It was underlined that that proposal made clear that certain conducts by parties (for example, requests that resulted in delay or disruption of the process, or requests that were abusive or unjustified) could have an impact on cost allocation and that in order to hold the relevant party responsible, the arbitral tribunal would have to find that the requests were unreasonable.

Paragraph 47 of the draft revised Notes

54. It was generally agreed that decisions by the arbitral tribunal on cost and its allocation could be made at any time during the proceedings and not necessarily with the final award on the merits. Therefore, it was agreed to include the word "necessarily" between the words "not" and "need" in the first sentence of paragraph 47. It was further agreed that the draft revised Notes should illustrate the possibility of decisions on the cost and its allocation being made subsequent to the final award.

55. In response to a suggestion that the "final" award referred to in the first sentence of paragraph 47 might not necessarily be on the merits (for example, if the proceedings terminated with an award on jurisdiction), it was agreed that words "on the merits" should be deleted.

56. While a suggestion was made that the draft revised Notes should address the question of security for costs, it was considered not to be necessary.

Note 6 — Information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration (paras. 48 to 53)

Paragraph 49 of the draft revised Notes

57. A suggestion was made to include in paragraph 49 a reference to the applicable arbitration law in order to draw attention of the parties to the existing legislative framework on confidentiality. It was further pointed out that while there might be provisions on confidentiality in the applicable arbitration law or arbitration rules, the parties should be made aware that such provisions might not be mandatory or sufficiently address the concerns of the parties.

58. After discussion, the Commission agreed to revise paragraph 49 along the following lines: "Should confidentiality be a concern or priority and should the parties not be satisfied by the treatment of that issue in the non-mandatory provisions of the applicable arbitration law or derogable provisions of the arbitration rules, the parties may wish to provide for confidentiality in the form of an agreement".

Paragraphs 51 and 52 of the draft revised Notes

59. A suggestion was made that paragraphs 51 and 52 should be elaborated to illustrate instances where parties from different jurisdictions might be subject to different obligations in relation to confidentiality or disclosure under the law applicable to them or to their counsel in their respective jurisdiction. It was noted that paragraph 51 already addressed that question in general terms. The Commission

agreed to consider at a later stage whether a more detailed provision on the issue would be required.

Paragraph 53 of the draft revised Notes

60. It was noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-States Arbitration[8] ("UNCITRAL Transparency Rules") could also apply by agreement of the disputing parties under article 1(2)(a) of the UNCITRAL Transparency Rules, and paragraph 53 should be revised taking that into account.

Note 7 — Means of communication (paras. 54 to 57)

Paragraph 54 to 57 of the draft revised Notes

61. It was said that a cross-reference to paragraphs 65 and 79 at the end of paragraph 54 was misleading and should be either deleted or relocated. A suggestion was made that a reference to the impact of cost when selecting electronic means of communication should be included in paragraph 56. A suggestion to revise the heading of paragraph 57 to better reflect its content did not receive support.

Note 8 — Interim measures (paras. 58 to 61)

Paragraph 58 of the draft revised Notes

62. It was suggested that paragraph 58 should set out the general rule that the applicable arbitration law and arbitration rules usually included provisions on interim measures.

Paragraph 59 of the draft revised Notes

63. The Commission agreed that the first sentence of paragraph 59 should be clarified to provide that when it was possible for a party to request an interim measure from a domestic court before or during the arbitral proceedings, an established principle was that such a request would not be incompatible with an agreement to arbitrate.

64. Various views were expressed on the provision that an interim measure was usually temporary in nature. A suggestion was made to delete the word "usually" as an interim measure would always be temporary. In response, it was suggested that the drafting style of the draft revised Notes catered for possible exceptions, and therefore it might be useful to retain that word. Yet, another view was that the statement on the nature of interim measures was redundant and could be deleted. In support of that suggestion, it was said that caution should be taken in defining or characterizing interim measures, which might differ according to the relevant laws or applicable arbitration rules. Another suggestion was to retain the text possibly in paragraph 58, so as to provide that a party might request a temporary relief in the form of an interim measure. During that discussion, attention was drawn to article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006[9] ("Model Law on

[8] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

[9] United Nations publication, Sales No. E.08.V.4.

Arbitration") and article 26(2) of the UNCITRAL Arbitration Rules (as revised in 2010)[10] which provided that "an interim measure is any temporary measure (...)".

65. After discussion, the Commission agreed that Note 8 should reflect the principle that an interim measure would be temporary in nature.

66. It was further suggested that the draft revised Notes should not appear to encourage the issuance of interim measures in the form of an award (which was usually deemed "final" and "binding") after emphasizing the temporary nature of such measures. It was also suggested that draft revised Notes should not include any provisions on the form of interim measures. In support of that suggestion, it was said that the draft revised Notes provided limited guidance on the form of an award (see Note 20). Views were also expressed that the matter of form of interim measures was beyond the scope of the draft revised Notes.

67. After discussion, it was agreed that the reference to the form of interim measures should be deleted from paragraph 59 but that issue might possibly be considered at a later stage in conjunction with the deliberation on Note 20 on requirements concerning the award. (See further para. 132 below.)

68. A suggestion to address issues pertaining to emergency arbitrator in the draft revised Notes did not receive support.

Paragraph 60 of the draft revised Notes

69. It was suggested that paragraph 60 should be revised as it could be misunderstood as obliging the arbitral tribunal to provide information to the parties relating to interim measures and it was generally not the practice for arbitral tribunals to provide such detailed information when confronted with a request. After discussion, it was agreed that the first sentence of paragraph 60 should be recast to set out elements for the parties and the arbitral tribunal to consider when requesting or ordering interim measures. During the discussion, particular emphasis was put on item (v) of that paragraph regarding the available mechanism for enforcement of interim measures.

70. A question was raised whether the draft revised Notes should address possible conflict of an arbitral tribunal's decision on interim measures with a court-ordered interim measure. For instance, it was questioned whether an arbitral tribunal would be bound by the court-ordered interim measure or could consider the matter de novo.

Paragraph 61 of the draft revised Notes

71. It was agreed that the second and third sentences of paragraph 61 should be retained and the square brackets deleted. It was further suggested that the second sentence of paragraph 61 should be qualified to state that the party requesting an interim measure might be liable for any costs and damages caused by the measure under applicable law, which, in most instances, would be the arbitration law.

72. A question was raised whether the words "in the circumstances then prevailing" should be deleted, as that provision, which mirrored article 17G of the

[10] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

Model Law on Arbitration and article 26(8) of the UNCITRAL Arbitration Rules (as revised in 2010) might not exist in the applicable law or rules. In support of retaining those words, it was said that paragraph 61 provided useful indications as to the scope and basis for the liability. The Commission recalled the extensive deliberation it had during the revision of the Model Law on Arbitration and in particular, reference was made to document A/CN.9/WG.II/WP.127 which contained an overview of legislative approaches to that question.

73. A suggestion was made that issues relating to security in connection with interim measures and liability for costs and damaged caused by such measures should be dealt with separately following the approach in the Model Law on Arbitration (arts. 17E and 17G) and the UNCITRAL Arbitration Rules (as revised in 2010) (art. 26(6) and (8)).

74. The Commission agreed that the draft revised Notes should include a provision noting that the arbitral tribunal and the parties might envisage a procedure to raise claims regarding costs and damages arising from interim measures.

Note 9 — Written submissions (paras. 62 to 64)

75. The Commission agreed that Note 9 should emphasize the need for the parties to consider how to proceed with the round(s) of written submissions and provide more information on the matter. The Commission also agreed to include a reference to arbitration rules in the last sentence of paragraph 64.

Note 10 — Practical arrangements concerning written submissions and evidence (para. 65)

76. In relation to paragraph 65, it was agreed that the list should not be presented as an exhaustive one and that the chapeau should indicate that certain sets of arbitration rules contained provisions on such practical arrangements concerning written submission and evidence.

77. A suggestion was made that the question of preservation of documents, particularly in electronic form, should be highlighted as a matter for consideration by the parties and the arbitral tribunal at the outset of the proceedings. In particular, it was noted that certain jurisdictions imposed legal obligations on the parties to preserve evidence even before the commencement of proceedings. The Commission agreed that that matter should be addressed in the draft revised Notes and possibly considered further in relation to Note 13 on documentary evidence.

Note 11 — Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 66 to 69)

Paragraph 69 of the draft revised Notes

78. The Commission agreed that paragraph 69 provided useful guidance and should be retained without the square brackets. The Commission recalled the discussion of the Working Group that in certain jurisdictions, arbitral tribunals were expected to assist the parties to avoid the case failing on reasons of form, whereas in other jurisdictions, arbitral tribunals should not be perceived as giving advice to one party (A/CN.9/826, para. 116). In the same line, it was mentioned that depending on the circumstances (including the applicable arbitration law), it might not always be

appropriate for the arbitral tribunal to inform the parties of its concerns and depending on the context, the arbitral tribunal might need to take caution in raising such concerns. The Commission agreed to further consider whether paragraph 69 adequately reflected the various approaches to that matter.

Note 12 — Amicable settlement (para. 70)

Paragraph 70 of the draft revised Notes

79. A suggestion to replace the words "in appropriate circumstances" by the words "as a matter of principle" did not receive support as the paragraph reflected different approaches.

80. It was further agreed that the third sentence of paragraph 70 should not be limited to settlement "by a third party mediator", but be expanded to settlement "by any other means", which would include settlement between the parties and by a third party.

81. While a suggestion was made that paragraph 70 should provide more detail on the procedure for facilitating settlement and possible impact on the arbitral proceedings (for example, whether ex-parte communication would be allowed and the role of the tribunal if no settlement was reached), it was agreed that the current text sufficiently illustrated the different approaches with regard to amicable settlement and need not be expanded.

Note 13 — Documentary evidence (paras. 71 to 83)

Paragraphs 72 to 74 of the draft revised Notes

82. The Commission agreed to revise the sub-heading of paragraphs 72 to 74 to include not only consequences of late submission but also failure to submit as provided in paragraph 74.

83. It was agreed that paragraph 72 should include a provision that an arbitral tribunal might direct the parties to submit evidence relied upon along with their written submissions or at another time.

84. It was said that the second sentence of paragraph 73 was not a proper example of a "consequence" for late submissions. In that context, it was agreed that paragraph 73 should reflect the need for the arbitral tribunal to balance the procedural efficiency achieved by refusing late submissions and the possible usefulness of accepting late submissions. It was further mentioned that paragraph 73 should reflect the need to balance the enforcement of procedural rules with the interest of the parties (for example, providing the other party an opportunity to comment or produce further evidence with respect to the late submission).

85. In relation to paragraph 74, a number of suggestions were made. One view was that the word "inferences" was inappropriate and should be replaced by the word "conclusions" as used in the original version of the Notes. Another view was that the sentence was contradictory in the sense that the arbitral tribunal was free to draw inferences from the failure, yet had to make the award solely on the evidence before it. Yet another view was that paragraph 74 should be made consistent with article 25(b) of the Model Law on Arbitration and article 30(1)(b) of the UNCITRAL Arbitration Rules (as revised in 2010), both addressing the situation

where a respondent failed to communicate its response to the notice of arbitration or its statement of defence, whereby the arbitral tribunal would not be able to treat such failure in itself as an admission of the claimant's allegations.

86. In that context, it was highlighted that while the draft revised Notes provided that the arbitral tribunal could draw inferences from the failure to produce evidence when ordered to do so, it did not address the consequences of non-participation in the proceedings.

87. After discussion, it was agreed that paragraph 74 should be revised to provide a general rule that if a party failed to produce evidence to support its case within the time limit without showing sufficient cause, the arbitral tribunal could make the award on the evidence before it. It was further agreed that the question whether the arbitral tribunal would be free to draw any inference from a party's failure to produce specific evidence when ordered to do so by the arbitral tribunal would need to be dealt with separately in relation to paragraphs 75 and 76. (Requests to produce documentary evidence.)

Paragraphs 75 and 76 of the draft revised Notes

88. Recalling that paragraphs 75 and 76 dealt with production of documentary evidence upon the request of a party and the role of the arbitral tribunal in that procedure, the Commission noted that the practices as well as perceptions of parties might vary significantly. In order to highlight that aspect, it was agreed that the first sentence of paragraph 76 should be placed at the beginning of paragraph 75.

Paragraph 77 of the draft revised Notes

89. In relation to paragraph 77, it was suggested that the words "in the absence of a specific objection" was too definitive and that wording along the lines of paragraph 52 of the original version of the Notes ("It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time ...") would be preferable.

90. Another suggestion was to delete the words "including any translation thereof" from paragraph 77 and to address the issue of translated documents separately.

Paragraph 78 of the draft revised Notes

91. It was suggested that paragraph 78 should be revised to first deal with provenance and authenticity of documents and then draw the attention of parties to issues that might arise particularly with documents disclosed only electronically or those generated electronically and disclosed in hard copy. Therefore, it was agreed that the first sentence should be deleted and the second sentence should be revised along the following lines: "If there are issues with the provenance and authenticity of the documents (...)". It was further agreed that a sentence should be added drawing the attention of the parties and the arbitral tribunal to the peculiarities of electronic documents, in particular with respect to issues that could arise with the preservation of data.

Paragraph 81 of the draft revised Notes

92. The Commission agreed that paragraph 81 should be revised to provide that the question whether to prepare a joint set of documentary evidence would often not be resolved at the outset of the proceedings but rather, if agreed, the joint set would usually be prepared before the hearings.

Paragraph 83 of the draft revised Notes

93. It was suggested that the word "expert" in the first sentence of paragraph 83 could be misleading as that word was used in a different context in Note 15. In that regard, it was recalled that paragraph 54 of the original version of the Notes used the words "person competent in the relevant field".

94. After discussion, the Commission agreed to retain the word "expert" in paragraph 83 in the broad sense. It was further understood that if an expert in the context of Note 15 were to present a summary report referred to in paragraph 83, the procedures spelled out in Note 15 would also apply.

Note 14 — Witnesses of fact (paras. 84 to 97)

Subheading of paragraphs 84 to 88 of the draft revised Notes

95. The Commission agreed that the words "and their representatives" should be added at the end of the subheading of paragraphs 84 to 88.

Paragraphs 84 and 85 of the draft revised Notes

96. It was agreed that the draft revised Notes should include a general explanation about the term "witness statement" along the following lines: "A witness statement is a written document sufficient to serve as evidence of that witness in the matter in dispute." While a suggestion was made that the draft revised Notes could illustrate certain requirements of a witness statement (for instance, that it be signed by the witness), it was generally agreed that that was not necessary.

Paragraph 86 of the draft revised Notes

97. It was suggested that the first sentence of paragraph 86 was too definitive and thus could be combined with the second sentence. It was mentioned that the first sentence provided useful guidance on the fact that written statements need not be repeated orally either in full or in part, which should be retained in the draft revised Notes.

98. The Commission agreed that the words "or updating" should be added after the word "confirmation" in the second sentence of paragraph 86. In relation to the third sentence of that paragraph, it was agreed that the words "for oral testimony by uncontroversial witnesses" should be replaced by the words "for hearing uncontroversial testimony".

Paragraph 87 of the draft revised Notes

99. As a matter of drafting, it was agreed that the words "refer to" should be replaced by the word "identify".

Paragraph 88 of the draft revised Notes

100. It was suggested that the first sentence of paragraph 88 should clarify whether it applied only to the party's witness or also to the other party's witness. While a suggestion was made that the third sentence could be deleted as the fourth sentence made it redundant, it was stated that the third sentence reflected the recent trend in international arbitration with respect to pre-testimony contacts with witnesses.

101. It was agreed that paragraph 88 should be expanded to explain the various approaches for further consideration by the Commission. It was also agreed that the last sentence of paragraph 88 should be expanded with respect to issues raised by the parties' involvement in the preparation of oral testimony by witnesses.

Paragraph 90 of the draft revised Notes

102. The Commission agreed that paragraph 90 should be revised to first address who would be responsible for questioning the witnesses and then the degree of control over the hearings.

Paragraph 92 of the draft revised Notes

103. The Commission agreed to revise paragraph 92 to: (a) express more clearly the various practices in relation to the presence of witnesses in the hearing room before and after they have testified; (b) provide that to the extent that witnesses were not allowed in the hearing room, it would be important that those witnesses should also not have access to any contemporaneous transcripts of the hearings; (c) indicate that witnesses should not discuss their testimony during any interruption thereof; and (d) include more detailed information about the presence of parties' representatives in the hearing room, as their exclusion from the hearing room required a different treatment.

104. It was agreed that requirements in paragraphs 89 to 93 (manner of taking oral evidence) should also apply to witnesses that provided their testimony remotely via technological means.

Paragraphs 94 and 95 of the draft revised Notes

105. It was suggested that the words "and questioned" could be added at the end of the subheading to paragraphs 94 and 95.

106. In relation to the third sentence of paragraph 94, it was noted that it was usually the party calling the witnesses that would select the order in which it wished to have its witnesses called, particularly as it would be in a better position to know the availability of the witnesses. In that context, a question was raised whether the party cross-examining would have a say in choosing the order.

107. A suggestion was made that paragraph 95 should be reviewed in conjunction with paragraph 86 to avoid any inconsistency and touch upon the interrelationship between written and oral statements. A question was raised whether the draft revised Notes should deal with presentation of new evidence during the hearings.

108. In relation to the last sentence of paragraph 95, it was suggested that the cross-examining party should also be able to re-examine the witness in addition to the party calling that witness. Accordingly, it was said that a sentence should be

added stating the possibility for the arbitral tribunal and/or the cross-examining party to further question the witness after re-examination by the party calling the witness. It was further agreed that re-examination should be limited to issues raised during the cross-examination.

Paragraph 96 of the draft revised Notes

109. In relation to paragraph 96, it was agreed that: (a) the words "in any way related to" in the first sentence and the words in the parentheses in the last sentence should be clarified; (b) reference should also be made to arbitration practice in the second sentence; and (c) the words "whether statements from such persons may be submitted and considered" in the third sentence should be deleted as representatives should not be prohibited from submitting statements.

Paragraph 97 of the draft revised Notes

110. It was agreed that paragraph 97 should be revised to: (a) clarify that it only applied to witnesses invited to testify; (b) set out possible consequences for non-appearance of a witness; and (c) state that the arbitral tribunal should be given some flexibility to deal with the non-appearance of a witness including what weight to be given to the written statement, if any, of that witness.

Possible application of the UNCITRAL Transparency Rules

111. In response to a question on how paragraphs 92 and 93 would apply when the hearing would be made public (for example, under the UNCITRAL Transparency Rules), it was agreed that the footnote to paragraph 53 could be elaborated to provide that the UNCITRAL Transparency Rules could have an impact on other aspects of the proceedings.

Note 15 — Experts and expert witnesses (paras. 98 to 111)

112. The Commission agreed that Note 15 should make consistent use of the term "expert opinion".

113. A suggestion was made that the term "expert witnesses" should be used in Note 15 to refer to both experts presented by the parties and those appointed by the arbitral tribunal. It was further said that both categories of experts gave opinion, and therefore, should not be distinguished by using different terms. That suggestion did not receive support.

114. In that context, it was pointed out that the terms currently used in Note 15 to refer to the different categories of experts were consistent with the UNCITRAL Arbitration Rules (as revised in 2010), in particularly article 29, where the term "experts appointed by the arbitral tribunal" was used. It was further pointed out that a party could present both "witness of fact" and "expert witness" whereas the arbitral tribunal would appoint its "expert". It was also pointed out that not all legal systems were familiar with the notion of "expert witness" and therefore, it might be useful for it to be elaborated in the draft revised Notes. It was suggested to refer to the practice of requiring experts to detail their expertise by providing a resume or a list of recent experience.

Paragraph 100 of the draft revised Notes

115. The Commission agreed to provide more information about practices regarding the presentation of points of agreement and disagreement by expert witnesses.

Paragraphs 105 to 109 of the draft revised Notes

116. The Commission agreed to include a provision highlighting that the arbitral tribunal should take into account efficiency of the proceedings when deciding whether to appoint an expert.

117. The Commission agreed to replace the word "may" in the second sentence of paragraph 106 by the words "will usually" to clarify that it was usual practice for the arbitral tribunal to give parties an opportunity to comment on the expert's qualifications, impartiality and independence.

118. The Commission agreed to further consider the suggestion that paragraph 108 should provide that the arbitral tribunal might instruct its expert to observe due process in its communication with the parties. It was said that the question whether a tribunal-appointed expert should refrain from ex-parte communication was treated differently in various jurisdictions.

119. A suggestion to replace the word "comment" in paragraph 109 by the word "make submissions" did not receive support, as parties might not necessarily make formal submissions on expert opinions. The Commission agreed that paragraph 109 should also provide that, depending on circumstances, the parties would be given an opportunity to question a tribunal-appointed expert and agreed that the text could reflect the ability to present formal as well as informal submissions.

120. It was said that under some systems of law, expert opinions were treated as evidence by the arbitral tribunal. A question was raised whether expert opinions would always be treated as evidence by the arbitral tribunal once they were presented.

Paragraphs 110 and 111 of the draft revised Notes

121. A question was raised whether paragraphs 110 and 111 applied to both expert witnesses and tribunal-appointed experts. It was suggested that those paragraphs should be revised to clarify that: (a) terms of reference would usually be established for tribunal-appointed experts; and (b) terms of reference established by a party and its expert witness would usually not be shared and the relevant information listed in paragraphs 110 and 111 would be contained in the expert opinion.

122. It was agreed that the remuneration of the tribunal-appointed expert was an item to be included in its terms of reference. It was agreed that the draft revised Notes should point out that arbitral tribunals might wish to ensure that they were not held responsible in case the remuneration exceeded the amount initially indicated. During the deliberation, it was underlined that the terms of reference were important to ensure that the relationship between the arbitral tribunal and the expert would be transparent.

Note 16 — Other evidence (paras. 112 to 117)

Paragraphs 112 and 114 of the draft revised Notes

123. It was noted that the words "called upon" in the first sentence of paragraph 112 should not be interpreted as limiting the arbitral tribunal's ability to assessing physical evidence only when there was a request from a party. In relation to paragraph 114, it was agreed to replace the word "desirable" by the word "adequate".

124. While a suggestion was made that the draft revised Notes might address the possible complexities that might arise when sites, property, or goods to be inspected were under the control of a third party, it was generally felt that there was little guidance that could be provided on that issue.

Note 17 — Hearings (paras. 118 to 129)

125. A number of suggestions were made in relation to Note 17. One suggestion was to include a reference to "arbitration law" in the first sentence of paragraph 118. Another suggestion was that examples provided in parentheses in paragraph 121 should relate more closely to hearings (for example, availability of the witnesses). Yet another suggestion was that the words "submissions in relation to hearings" in the subheading to paragraphs 118 to 121 should be replaced by the words "post-hearing submissions". In relation to paragraph 126, it was suggested that the arbitral tribunal should set aside time for deliberations not only before or shortly after the close of the hearings but throughout the entire arbitration process. With respect to the second sentence of paragraph 127, it was suggested that more guidance should be provided on which of the parties had the last word, while approaches diverged on that matter. It was further suggested that paragraph 128 should provide that transcription by a person not present at the hearing of an audio recording could in some cases be extremely cumbersome and costly. All of the above-mentioned suggestions received support and it was agreed that Note 17 should be revised accordingly.

Note 18 — Multiparty arbitration (paras. 130 and 131) and Note 19 — Joinder and consolidation (paras. 132 to 136)

126. In relation to Notes 18 and 19, it was agreed to further consider whether the draft revised Notes should provide information about the issues that might arise from multiple arbitration agreements and from parallel proceedings.

127. In response to a suggestion that the paragraphs on joinder should provide more guidance on the criteria to be used by an arbitral tribunal in allowing joinders, it was suggested that procedural efficiency could be added to complement the criteria in paragraph 133.

Note 20 — Possible requirements concerning the award (paras. 137 to 139)

128. A suggestion was made that Note 20 should either be deleted as it was beyond the scope of the draft revised Notes or, if retained, elaborated further to discuss the wide range of issues that might arise particularly with regard to the form and content of the award (for example, whether the award would need to be signed by the arbitrators, whether electronic signatures could be used where the arbitrators

were in different locations, whether hard copies of the award would need to be produced, and how decisions would be made and recorded when there were more than one arbitrator).

129. However, it was widely felt that Note 20 sufficiently dealt with the procedural aspects limited to the filing or delivering of the award, similar to the original version of the Notes.

130. A suggestion to include a provision similar to that found in paragraph 44 on regulatory issues and issues arising from restrictions on trade or payment when formulating an award did not receive support.

131. After discussion, it was agreed that Note 20 should be retained in the current form with possible amendments to its heading to better reflect the content of paragraphs 138 to 139.

132. After its deliberation of Note 20, the Commission further agreed that it would not be necessary for the draft revised Notes to include a provision on the form of interim measures (see paras. 66 and 67 above).

3. Provisional approval of the draft revised Notes

133. The Commission approved the draft revised Notes in principle and requested the Secretariat to revise the draft text in accordance with the deliberations and decisions (see section 2 above). It was agreed that the Secretariat could seek input from Working Group II on specific issues, if necessary, during its sixty-fourth session. The Commission further requested that draft revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.

B. Planned and possible future work

134. Upon completion of its deliberation on the revision of the Notes, the Commission held a preliminary discussion regarding future work in the area of international arbitration and conciliation. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 18 (Work programme of the Commission) (see para. 341 below).

1. Enforcement of settlement agreements resulting from international commercial conciliation/mediation

135. The Commission recalled that at its forty-seventh session, in 2014, it had agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission on the feasibility and possible form of work in that area.[11] At that session, the Commission also invited delegations to provide information to the Secretariat in respect of that subject matter.[12] Accordingly, the Commission had before it a compilation of responses received by the Secretariat (A/CN.9/846 and addenda).

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[11] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

[12] Ibid.

136. The Commission noted that the Working Group at its sixty-second session considered the topic of enforcement of international settlement agreements resulting from conciliation proceedings (A/CN.9/832, paras. 13-59). At that session, while a number of questions and concerns were expressed, it had been generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

137. The Commission recalled that it had previously considered the issue of enforcement of international settlement agreements when preparing the UNCITRAL Model Law on International Commercial Conciliation (2002)[13] ("Model Law on Conciliation"). Reference was made to article 14 of the Model Law on Conciliation which stated the principle that settlement agreements were enforceable, without attempting to specify the method by which such settlement agreements might be enforced, a matter that was left to each enacting State.

138. There was general support to resume work in that area with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on.

139. However, doubts were expressed on whether it would be desirable to have a harmonized enforcement mechanism as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the Model Law on Conciliation. Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization.

140. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreement, possibly modelled on article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[14] (the "New York Convention").

[13] General Assembly resolution 57/18, annex.

[14] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

141. In response to the view that work on settlement agreements might overlap with existing work by other organizations (for instance, the judgements project of the Hague Conference on Private International Law), it was said that work of other organizations had a different focus and that the Commission would be a suitable forum for discussion on the topic.

142. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.

2. Concurrent proceedings

143. On the issue of concurrent proceedings, the Commission recalled that, at its forty-seventh session, in 2014, it agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area and that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[15] The Commission requested the Secretariat to report to the Commission outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[16]

144. In accordance with that request, the Commission had before it a note by the Secretariat in relation to concurrent proceedings in investment arbitration (A/CN.9/848). The Commission expressed its appreciation to the Secretariat for the note, which outlined the practical issues, the variety of situations that led to concurrent proceedings, the various options available to address those issues, and the possible form of any instrument to be developed in that area.

145. There was general support for retaining the topic of concurrent proceedings on the agenda of the Commission. It was highlighted that concurrent proceedings have proven to be detrimental to investment practice and thus was of particular interest to States. While support was expressed for the Working Group to undertake work on the topic as a matter of priority, it was widely felt that it was premature at this stage, and work should be undertaken only after a thorough analysis of the issues.

146. Accordingly, it was suggested that the Secretariat should keep abreast of developments in that area, provide further analysis and set out the issues and possible solutions in a neutral manner, which would assist the Commission making an informed decision at a later stage. It was suggested that, consistent with the request of the Commission in 2014, work on the topic should also take into consideration concurrent proceedings in international commercial arbitration.

147. After discussion, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.

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[15] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 130.

[16] Ibid.

3. Code of ethics/conduct for arbitrators

148. The Commission had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.

149. There was general interest in the topic, which could be explored taking into account the wide range of issues and approaches. In particular, it was widely felt that future work in that area should not be limited to investment arbitration but also deal with international commercial arbitration. In response, it was noted that the peculiarities of investment arbitration might require a slightly different approach.

150. It was suggested that existing laws, regulation and rules (for example, provisions on disclosure in relation to impartiality and independence) that had an impact on the conduct of arbitrators should be identified. It was also suggested that work conducted by other organizations on the topic would need to be considered. In that context, it was noted that in international arbitration, counsels for the parties as well as the arbitral tribunals could be bound by more than one standard of ethics depending on their nationality, affiliation with bar associations as well as place of arbitration.

151. After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including both in the field of commercial and investment arbitration, taking into account existing laws, rules and regulations as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.

C. Establishment and functioning of the transparency repository

152. The Commission recalled that, under article 8 of the UNCITRAL Transparency Rules, the repository of published information under the Rules (the "transparency repository") had to be established.

153. The Commission further recalled that, at its forty-sixth session, in 2013, it expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of the transparency repository. At that session, it was said that the United Nations, as a neutral and universal body, and its secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of a transparency repository, as a public administration directly responsible for the servicing and proper operation of its own legal standards.[17]

154. The Commission also recalled that, at its forty-seventh session, in 2014, the Secretariat had reported on steps taken in respect of the repository function to be performed, including the preparation of a dedicated web page (www.uncitral.org/transparency-registry). At that session, the Commission was informed that in line with the request by some States that the additional mandate bestowed on the UNCITRAL secretariat be fulfilled on a cost-neutral budgetary

[17] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 79-98.

basis in relation to the United Nations regular budget, efforts were made to establish the transparency repository as a pilot project temporarily funded by voluntary contributions. Accordingly, the Commission, at that session, reiterated its mandate to its secretariat to establish and operate the transparency repository, initially as a pilot project, and, to that end, to seek any necessary funding.[18]

155. The Commission was informed that the General Assembly, in its resolution on the report of the Commission on the work of its forty-seventh session noted with appreciation that the secretariat of the Commission had taken steps to establish and operate the transparency repository, as a pilot project temporarily funded by voluntary contributions, and in that regard requested the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository.[19]

156. In that context, the Commission heard an oral report on the steps taken by the Secretariat to establish and operate the transparency repository and the difficulties it was facing.

157. The Commission first took note of the view that the current wording in the General Assembly resolution might be seen as not constituting a proper mandate for the Secretariat because the General Assembly did not specifically "request" the Secretary-General to establish and operate the transparency repository. It also took note of the view that additional procedures contemplated in the Rules of Procedure of the General Assembly as well as the Financial Regulations and Rules of the United Nations should have been followed despite the fact that the transparency repository was to be fully funded by voluntary contributions.

158. With respect to the budget situation, the Commission was informed that the Secretariat had received confirmation from the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries (OPEC) for a grant of 125,000 USD, in addition to the European Union's commitment for 100,000 EUR, which would allow the Secretariat to operate the project on a temporary basis until the end of 2016. The Commission was also informed that the Secretariat was currently formalizing the funding arrangements with the donors, and the Commission expressed its great appreciation to the European Union and OFID for their commitments.

159. It was further noted that the operation of the transparency repository would not raise any liability issues as article 3 of the UNCITRAL Transparency Rules provided that the repository would not be involved in any decision-making regarding the information to be published. Finally, the Commission took note of the possible scenarios upon the end of the pilot project which could be: (a) continuing to operate entirely on extrabudgetary resources; (b) seeking regular budget resources or redeploying resources within the Secretariat; and (c) possibly entrusting entities outside the United Nations with that function.

160. During the discussion, the Commission emphasized that the transparency repository should be fully operational as soon as possible, as the repository constituted a central feature of both the UNCITRAL Transparency Rules and the

[18] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 108-110.

[19] General Assembly resolution 69/115, para. 3.

Mauritius Convention on Transparency[20] by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules and the Convention. It was also highlighted that the operation of the transparency repository by the secretariat of the Commission would be perceived as a robust signal in support of transparency in investor-State treaty-based arbitration and the relevant UNCITRAL texts on transparency.

161. After discussion, the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should establish and operate the transparency repository, initially as a pilot project. To that end, the Commission agreed to recommend to the General Assembly that it request the secretariat of the Commission to establish and operate the repository of published information under the UNCITRAL Transparency Rules, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions.

D. International commercial arbitration and mediation moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

162. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-second Moot, the oral arguments phase of which had taken place in Vienna from 27 March to 2 April 2015. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-second Moot were based on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[21] (the "United Nations Sales Convention"). A total of 298 teams from 72 jurisdictions participated and the best team in oral arguments was Ottawa University (Canada). The oral arguments phase of the Twenty-third Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 18 to 24 March 2016.

163. It was also noted that the Vis East Moot Foundation had organized the Twelfth Willem C. Vis (East) International Commercial Arbitration Moot, which had been co-sponsored by the Commission and the East Asia Branch of CIARB. The final phase took place in Hong Kong, China, from 15 to 22 March 2015. A total of 107 teams from 29 jurisdictions participated in the Twelfth (East) Moot and the best team in oral arguments was Singapore Management University (Singapore). The Thirteenth (East) Moot would be held in Hong Kong, China, from 6 to 13 March 2016.

2. Madrid Commercial Arbitration Moot 2015

164. It was noted that Carlos III University of Madrid had organized the Seventh International Commercial Arbitration Competition in Madrid from 20 to 24 April 2015, which had been co-sponsored by the Commission. Legal issues addressed by the teams related to an international master franchising contract and

[20] General Assembly resolution 69/116, annex.

[21] United Nations, *Treaty Series*, vol. 1489, No. 25567.

sale of goods, where the United Nations Sales Convention, the New York Convention, the Unidroit texts on franchising and the Rules of Arbitration of the Court of Arbitration of Madrid[22] were applicable. A total of 30 teams from 13 jurisdictions participated in the Madrid Moot which was held in Spanish. The best team in oral arguments was Pontificia Universidad Católica del Perú (Peru). The Eighth Madrid Moot would be held from 25 to 29 April 2016.

3. Mediation and negotiation competition

165. It was noted that the first mediation and negotiation competition organized jointly by IBA and VIAC had taken place in Vienna from 1 to 4 July 2015 and had been co-sponsored by the Commission. Legal issues addressed by the teams had been those addressed at the Twenty-second Willem C. Vis International Commercial Arbitration Moot (see para. 162 above). A total of 16 teams from 13 jurisdictions had participated.

IV. Consideration of issues in the area of security interests

A. Introduction

166. The Commission recalled that, at its forty-sixth session, in 2013, it had confirmed its decision that Working Group VI (Security Interests) should prepare a model law on secured transactions (the "draft Model Law") based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions[23] (the "Secured Transactions Guide") and consistent with all texts prepared by the Commission on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[24] (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property[25] (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry[26] (the "Registry Guide").[27] The Commission also recalled that, at its forty-seventh session, in 2014, it had requested the Working Group to expedite its work to complete the draft Model Law and submit it to the Commission for adoption.[28]

167. At its current session, the Commission had before it the reports of the twenty-sixth and twenty-seventh sessions of the Working Group (A/CN.9/830 and A/CN.9/836, respectively), as well as two notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/852 and A/CN.9/853). The Commission noted that at its twenty-sixth and twenty-seventh sessions the Working Group completed the second reading of the draft Model Law. In addition, the Commission noted with appreciation that, at its twenty-seventh session, the Working Group approved the substance (i.e. the policy) of the provisions of several chapters

[22] Available from www.camaramadrid.es/doc/linkext/rules-of-arbitration.pdf.

[23] United Nations publication, Sales No. E.09.V.12.

[24] General Assembly resolution 56/81, annex.

[25] United Nations publication, Sales No. E.11.V.6.

[26] United Nations publication, Sales No. E.14.V.6.

[27] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.

[28] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

of the draft Model Law and submitted to the Commission for approval in principle (i.e. approval of the policy) the registry-related, the conflict-of-laws and the transition provisions of the draft Model Law (A/CN.9/836, para. 122). Moreover, the Commission noted that, at that session, the Working Group recommended the preparation of a guide to enactment of what would become the UNCITRAL Model Law on Secured Transactions (the "Guide to Enactment") (A/CN.9/836, para. 121).

168. The Committee of the Whole, established by the Commission at its current session (see para. 12 above), proceeded with the consideration of agenda item 5(a), Consideration and provisional approval of parts of a model law on secured transactions, on the basis of a note by the Secretariat (A/CN.9/852). The Commission also considered a proposal submitted by the delegation of the United States of America. The report of the Committee is reproduced in section B.1 below.

B. Consideration and provisional approval of parts of a model law on secured transactions

1. Report of the Committee of the Whole

Article 26 of the draft Model Law: Establishment of a national public registry and public access

169. It was noted that chapter IV of the draft Model Law on the registry system was reduced to one article and the registry-related text was included in the draft Registry Act on the understanding that, as provided in article 26 of the draft Model Law, the registry-related provisions set forth in the draft Registry Act might be implemented in the law enacting the draft Model Law, a separate act, decree or regulation, or a combination thereof. On the understanding that the name and the location of the draft Registry Act would be discussed after the Committee had discussed all the registry-related provisions, the Committee approved the substance of article 26 of the draft Model Law unchanged. In that connection, the Committee agreed that the Secretariat was authorized to introduce any necessary drafting changes in article 26 of the draft Model Law and the provisions of the draft Registry Act.

170. In addition, it was agreed that the definitions of the Registry Guide should be included in the draft Registry Act. Moreover, it was agreed that the Guide to Enactment should discuss: (a) the registration of notices other than security right notices (e.g. enforcement notices, notices of preferential claims or judgement claims); and (b) that, in line with recommendation 54, subparagraph (j), of the Secured Transactions Guide and recommendation 5 of the Registry Guide, the Registry should be fully electronic, if possible, explaining the different possible levels (e.g. a database, as first level, then electronic registration and access, etc.).

Article 1 of the draft Registry Act: One notice sufficient for multiple security rights

171. It was agreed that article 1 of the draft Registry Act should be revised to better reflect the policy that one notice might relate to security rights created under multiple security agreements between the parties identified in the registered notice. Subject to that change, the Committee approved the substance of article 1 of the draft Registry Act.

172. In addition, it was agreed that a new provision should be inserted within square brackets at the beginning of the draft Registry Act to address the purpose of the draft Registry Act and its relationship to the draft Model Law. Moreover, it was agreed that the Guide to Enactment should explain that that provision would be necessary only if the enacting State decided to implement the draft Registry Act in a law other than the law that would implement the draft Model Law.

Article 2 of the draft Registry Act: Advance registration

173. It was agreed that article 2 of the draft Registry Act should be revised to refer to any notice, since, if an initial notice had been registered in advance of the creation of a security right and ultimately the security right was not created, a cancellation notice would need to be registered. In addition, it was agreed that the Guide to Enactment should explain that matter. Moreover, it was agreed that article 2 should refer to a security agreement "between the parties identified in the registered notice". Subject to those changes, the Committee approved the substance of article 2 of the draft Registry Act.

Article 3 of the draft Registry Act: Grantor's authorization for registration

174. It was agreed that article 3 of the draft Registry Act should be revised so that: (a) paragraphs 1, 2 and 3 would provide that the registration of a notice would be ineffective unless authorized by the grantor; (b) subparagraph 2(a) would refer to the security agreement or another agreement with the grantor identified in the registered notice; and (c) subparagraph 2(b) should be deleted, since the matter was sufficiently addressed in paragraph 3, according to which in the case of the addition of a new grantor, the amendment notice should be authorized by the new grantor (and not permit the existing grantor to prevent the addition of a new grantor). It was also agreed that the Guide to Enactment should clarify that paragraph 3 did not apply to a situation where there was no new grantor but rather a change of the name of the grantor. Subject to those changes, the Committee approved the substance of article 3 of the draft Registry Act.

Article 4 of the draft Registry Act: Public access conditions

175. It was agreed that article 4 of the draft Registry Act should be revised so that: (a) a second paragraph would be inserted to refer to the security procedures for a person to obtain access to the registry services (and thus the risk of the registration of amendment and cancellation notices not authorized by the secured creditor would be minimized, see article 20 of the draft Registry Act); and (b) paragraph 3 would refer to the obligation of the Registry to communicate the reason for refusing access "without delay". It was also agreed that the Guide to Enactment should clarify that: (a) the term "notice form" included both a paper and an electronic form (or screen); (b) any security procedures (or other policy matter) should be prescribed by the Registry only if the Registry was a governmental authority, and, otherwise, by the governmental authority supervising the Registry (see article 26 of the draft Registry Act). Subject to those changes, the Committee approved the substance of article 4 of the draft Registry Act.

Article 5 of the draft Registry Act: Rejection of the registration of a notice or a search request

176. It was agreed that paragraph 3 of article 5 of the draft Registry Act should be revised to refer to the obligation of the Registry to communicate the reason for the rejection of a notice or search request "without delay". Subject to that change, the Committee approved the substance of article 5 of the draft Registry Act.

Article 6 of the draft Registry Act: No verification of information in a notice by the Registry

177. It was agreed that article 6 of the draft Registry Act should be revised so that: (a) the bracketed text in paragraph 1 would be deleted as unnecessary; and (b) a third paragraph should be inserted to provide that, except as provided in article 5 of the draft Registry Act, the Registry was not entitled to reject or conduct any scrutiny of the content of a search request. Subject to those changes, the Committee approved the substance of article 6 of the draft Registry Act.

Article 7 of the draft Registry Act: Information required in an initial notice

178. It was agreed that the words "permit or" in subparagraph (a) of article 7 of the draft Registry Act should be deleted, since the article dealt with information "required" in an initial notice. It was also agreed that the Guide to Enactment should clarify that: (a) the additional information referred to in subparagraph (a) would not be part of the grantor identifier; (b) some States used additional information (e.g. unique ID numbers) as grantor identifiers; and (c) a notice might relate to more than one grantor or secured creditor and the required information should be entered separately for each grantor or secured creditor. Subject to those changes, the Committee approved the substance of article 7 of the draft Registry Act.

Article 8 of the draft Registry Act: Grantor identifier

179. It was agreed that article 8 of the draft Registry Act should be revised so that: (a) its structure would be aligned more closely with the structure of recommendation 24 of the Registry Guide; (b) the wording of the chapeau of paragraph 1 would be aligned with paragraph 2 to state that "where the grantor is a natural person, the grantor identifier is"; and (c) subparagraph 1 (c) would state more clearly that it referred to the grantor's "legal name" that might not be reflected in any official document. It was also agreed that the Guide to Enactment should: (a) mention examples of official documents and the hierarchy among them (see the Registry Guide, paras. 163-168); and (b) draw the attention of enacting States to the need to deal with identifiers of foreign grantors (see the Registry Guide, para. 169). Subject to those changes, the Committee approved the substance of article 8 of the draft Registry Act.

Article 9 of the draft Registry Act: Secured creditor identifier

180. It was agreed that article 9 of the draft Registry Act should be revised so that reference would be made to the possibility that the secured creditor identifier might be the name of the secured creditor or its representative. It was also agreed that the Guide to Enactment should explain the meaning of the term "representative" and that, as registration did not create the security right, the representative was not the

actual holder of the security right. Subject to those changes, the Committee approved the substance of article 9 of the draft Registry Act.

Article 10 of the draft Registry Act: Description of encumbered assets

181. It was agreed that article 10 of the draft Registry Act should be revised to reflect the rules stated therein more clearly. It was also agreed that the Guide to Enactment should clarify that: (a) the description in the notice did not need to be identical to that in the security agreement; (b) to the extent that the description in the notice exceeded the description in the security agreement, the notice would not make effective against third parties a security right in such assets; (c) reference to an asset in a registered notice would not imply or represent that the grantor presently or in the future would have rights in the asset; and (d) a description by quantity or computational formula would meet the standard indicated in article 10. Subject to those changes, the Committee approved the substance of article 10 of the draft Registry Act.

Article 11 of the draft Registry Act: Language of information in a notice

182. It was agreed that article 11 should be revised to state that all information contained in a notice, except the names and addresses of the grantor and the secured creditor, ought to be expressed in the language to be specified by the enacting State.

183. However, differing views were expressed as to the legal consequence of a failure of the registrant to express that information in the language to be specified by the enacting State. One view was that, in such a case, the notice should be ineffective. Another view was that the notice should not be ineffective unless the failure of the registrant to comply would seriously mislead a reasonable searcher (the test in art. 23, para. 2, of the draft Registry Act). In that connection, it was stated that, if the description of an encumbered asset was not in the language specified by the enacting State, the notice should not be ineffective with respect to other encumbered assets, the description of which was in the appropriate language (a rule along the lines of art. 23, para. 4, of the draft Registry Act). After discussion, the Committee requested the Secretariat to prepare options to reflect the various views expressed.

184. With respect to the character set in which information in a notice should be expressed, it was agreed that it should be the character set specified and publicized by the Registry. In that connection, it was agreed that the Guide to Enactment should clarify that: (a) if the information in a notice was not expressed in the character set specified and publicized by the Registry, the information in the notice would not be legible for the Registry and thus the notice would be rejected under article 5, subparagraph 1 (b); and (b) if the Registry was not a governmental authority, the character set should be specified, publicized and modified only by the governmental authority supervising the Registry.

185. Subject to the above-mentioned changes, the Committee approved the substance of article 11 of the draft Registry Act.

Article 12 of the draft Registry Act: Time of effectiveness of the registration of a notice

186. It was agreed that article 12 of the draft Registry Act should be revised so that: (a) the material relating to initial or amendment notices would be grouped together and the material relating to cancellation notices would also be grouped together; (b) paragraph 2 would be aligned more closely with recommendation 11, subparagraph (c), of the Registry Guide; (c) paragraph 4 would refer to the words "without delay" (see para. 175 above); and (d) paragraph 5 would refer to the obligation of the Registry to "record" the date and time of the registration of a notice and to make it available upon request. Subject to those changes, the Committee approved the substance of article 12 of the draft Registry Act.

Article 13 of the draft Registry Act: Period of effectiveness of the registration of a notice

187. It was agreed that article 13 of the draft Registry Act should be revised so that: (a) paragraph 1 in all options would refer to the initial notice; and (b) a fourth paragraph would be added to all options to state explicitly what was implicit but unstated, namely that the period of effectiveness might be extended more than once. Subject to those changes, the Committee approved the substance of article 13 of the draft Registry Act.

Article 14 of the draft Registry Act: Obligation to send a copy of a registered notice

188. Recalling its earlier decision as to the time within which a prescribed action should be taken (see para. 175 above), the Committee agreed that in paragraph 1 of article 14 of the draft Registry Act reference should be made to the words "without delay". It was also agreed that a third paragraph should be added within square brackets to article 14 that would read along the lines of recommendation 55, subparagraph (c), of the Secured Transactions Guide to deal with the limitation of the liability of a secured creditor for failure to send a copy of the registered notice to the person identified in the notice as the grantor. Subject to those changes, the Committee approved the substance of article 14 of the draft Registry Act (see further para. 198 below).

189. It was also agreed that a new article should be inserted into the draft Registry Act to provide that, upon request by the person identified in the notice as the grantor, the Registry ought to provide information with respect to the identity of the registrant. In that connection, the Committee noted that, under article 4, subparagraph 1 (b), of the draft Registry Act, a registrant ought to identify itself, and, under article 6, paragraph 1, of the draft Registry Act, the Registry ought to maintain information about the registrant's identity.

Article 15 of the draft Registry Act: Right to register an amendment or cancellation notice

190. It was agreed that the terminology (i.e. "secured creditor or its representative" and "the person identified in the notice as the secured creditor") used in various articles of the draft Registry Act, such as article 7, subparagraph (b), article 9, paragraph 1, as revised (see para. 180 above) and article 15, paragraph 1, should be

reviewed to ensure clarity and consistency. In that connection, the Committee recalled the use of terminology in the Registry Guide (see the Registry Guide, paras. 8 and 9) and the fact that reference needed to be made in some articles to the person identified in the notice as the secured creditor, since the Registry could not know who the actual secured creditor was. It was also suggested that, to draw a clear distinction between the issue of who had the right to register an amendment or cancellation notice (addressed in article 15 of the draft Registry Act) from the issue of amendment or cancellation notices that were unauthorized by the secured creditor (addressed in article 20 of the draft Registry Act), paragraph 2 should be revised to read along the following lines: "Upon registration of an amendment notice by the person identified in the initial notice as the secured creditor changing the secured creditor, only the person identified in the amendment notice as the secured creditor may register an amendment or cancellation notice". It was also agreed that the Guide to Enactment should discuss the relationship between article 15 (which stated the rule that the person identified in a notice as the secured creditor had the right to register an amendment or cancellation notice) and article 3, paragraph 5, of the draft Registry Act (which stated that any authorization required for a notice could be given before or after registration). Subject to those changes, the Committee approved the substance of article 15 of the draft Registry Act.

Article 16 of the draft Registry Act: Information required in an amendment notice

191. The Committee approved the substance of article 16 of the draft Registry Act unchanged.

Article 17 of the draft Registry Act: Global amendment of secured creditor information

192. While some doubt was expressed as to whether article 17 of the draft Registry Act dealt with an essential registry facility, it was agreed that it was useful and should be retained (option A and the third version of option B). In addition, it was agreed that both options should clarify that they applied in the case of a change in the name (and/or address) of the secured creditor and an assignment of the secured obligation. Moreover, it was agreed that the Guide to Enactment should explain that: (a) option A could apply in the case of a fully electronic registry system, while option B could apply in the case of a registry system that would permit the registration of paper notices; (b) the introduction of special access procedures in article 4 would reduce the risk of unauthorized global amendments; and (c) the Registry would need to organize the registry record so as to facilitate global amendments, in particular as the secured creditor identifier was not a publicly available search criterion under article 21 of the draft Registry Act. Subject to those changes, the Committee approved the substance of article 17 of the draft Registry Act.

Article 18 of the draft Registry Act: Information required in a cancellation notice

193. The Committee approved the substance of article 18 of the draft Registry Act unchanged.

Article 19 of the draft Registry Act: Compulsory registration of an amendment or cancellation notice

194. It was agreed that paragraph 1 of article 19 of the draft Registry Act should be reorganized to deal first with the conditions for the registration of an amendment notice and then with the conditions for the registration of a cancellation notice. In addition, it was agreed that, in subparagraph 1 (b), reference should be made to any authorization by the grantor required for an amendment notice under article 3. Moreover, it was agreed that the payment of any fees under paragraphs 2 and 4 should not create any obstacle to the registration of an amendment or cancellation notice. It was also agreed that paragraph 6 should be deleted, since it was ambiguous and dealt with a matter typically addressed in civil procedure law.

195. It was also agreed that the Guide to Enactment should explain that, under article 19: (a) the secured creditor had an independent obligation to register an amendment or cancellation notice within a reasonable period of time after it became aware that any of the conditions in paragraph 1 were met; (b) liability for violations of the obligations provided for in article 19 was left to the law of the enacting State on liability for violations of statutory obligations; and (c) if the secured creditor did not comply with its obligation, the grantor had a right to seek the registration of an amendment or cancellation notice through a summary judicial or administrative procedure. It was also agreed that the Guide to Enactment could invite enacting States to identify the court or other authority that would have jurisdiction to consider a request under article 19 and other provisions of the Registry Act.

196. Subject to the above-mentioned changes, the Committee approved the substance of article 19 of the draft Registry Act.

Article 20 of the draft Registry Act: Amendment or cancellation notices not authorized by the secured creditor

197. It was agreed that all four options of article 20 of the draft Registry Act should be retained. In addition, it was agreed that the Guide to Enactment should discuss the different policy choices offered by each option and the impact of the design of the registry system on the choice of an option. Subject to those changes, the Committee approved the substance of article 20 of the draft Registry Act.

198. In the discussion of article 20, it was suggested that article 14 of the draft Registry Act might need to clarify that the Registry was obliged to send to the person identified in the notice as the secured creditor any notice, including amendment and cancellation notices. It was also suggested that the placement of article 14 in the draft Registry Act might need to be reviewed to avoid giving the impression that article 14 applied only to initial notices.

Article 21 of the draft Registry Act: Search criteria

199. The Committee approved the substance of article 21 of the draft Registry Act unchanged.

Article 22 of the draft Registry Act: Search results

200. The view was expressed that article 22 of the draft Registry Act should deal only with the obligation of the Registry to provide a search result upon request. It

was stated that the question of whether the search result should set forth information matching the search criterion exactly or closely was a technical question that should be left to each enacting State. The prevailing view, however, was that article 22 should deal with, and provide guidance to States with respect to, both issues. The view was also expressed that only option A (dealing with exact matches) should be retained in article 22, while option B (dealing with close matches) should be left to the enacting State and discussed in the Guide to Enactment. It was stated that such an approach would be consistent with article 23, paragraph 1, of the draft Registry Act, which presupposed that the registry system would be designed to retrieve only information that matched the search criterion exactly. While the prevailing view was that article 22 should cover both exact and close matches, the discussion of the exact meaning of article 23, paragraph 1, was deferred until it had the opportunity to discuss article 23 (see para. 202 below).

201. After discussion, it was agreed that the reference to "close" matches in option B was not clear and should be clarified by reference to "criteria or a method to be specified by the enacting State". In addition, it was agreed that paragraph 3 should be revised to read along the following lines: "A written search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary". Moreover, it was agreed that the Guide to Enactment should explain the exact-match approach of option A and the close-match approach of option B, and discuss their advantages and disadvantages, referring also to the discussion of those matters in the Registry Guide (see the Registry Guide, paras. 205, 206 and 268-271). Subject to those changes, the Committee approved the substance of article 22 of the draft Registry Act.

Article 23 of the draft Registry Act: Registrant errors in required information

202. Diverging views were expressed as to whether paragraph 1 of article 23 of the draft Registry Act applied to registry systems with an exact-match or a close-match search programme. One view was that paragraph 1 was based on the premise that the registry system would have an exact-match search programme. As a result, it was stated, an error that might seem minor or trivial in the abstract might nonetheless mean that the registration would not be effective if the error would cause the information in the registry record not to be retrieved by a searcher using the grantor's correct identifier as the search criterion. It was also suggested that, to address the close-match approach, a new provision should be inserted in article 23 of the draft Registry Act along the following lines: "An error in the grantor identifier entered in the notice does not render the registration of the notice ineffective, if the notice would be retrieved as a close match by a search of the registry record, unless the error would seriously mislead a reasonable searcher".

203. Another view was that paragraph 1 could practically apply only in the case of a close-match search programme. Thus, it was stated, a minor error in the grantor's identifier as provided in the notice would not render the notice ineffective if, under the registry's search programme, the notice would be retrieved as a close match on a search using the correct identifier. In addition, it was observed that modern registry search programmes were so designed as to typically result in not too long lists of notices matching the search criterion closely. Moreover, it was pointed out that, in any case, a close-match search programme should be publicized so that searchers would know how to conduct a search. It was also mentioned that, in an exact-match

system, there would be no need to introduce a test or a rule as currently stated in paragraph 1, since, if any error was made in the grantor's identifier, the notice would not be retrieved by a searcher using the correct grantor identifier. After discussion, the Committee agreed that a new provision along the lines mentioned above (see para. 202 above) should be inserted within square brackets in article 23 of the draft Registry Act for further consideration of the matter.

204. Diverging views were expressed as to whether paragraph 2 should be retained. One view was that paragraph 2 should be deleted. It was stated that article 10 of the draft Registry Act was sufficient in providing that, if the encumbered assets were not described in the notice in a manner that would reasonably allow their identification, the notice would be ineffective. It was also observed that an error in the address of the grantor should be addressed in paragraph 1, and not in paragraph 2. The prevailing view, however, was that paragraph 2 should be retained. It was stated that paragraph 2 was intended to address situations in which, while the description of the encumbered assets was sufficient, an error was made that could render the notice ineffective. It was also noted that an error in the address of the grantor should be subject to the test in paragraph 2 and not to the same test as an error in the grantor identifier in paragraph 1, because, unlike the grantor identifier, the address of the grantor was not a search criterion. After discussion, the Committee agreed that paragraph 2 should be retained. It was also agreed that the Guide to Enactment should discuss the relationship of articles 10 and 23 of the draft Registry Act.

205. As to the order of paragraphs 1 to 4, it was agreed that paragraph 3, which dealt with an error in the grantor identifier, should follow paragraph 1, while paragraph 4, which dealt with an error in the description of the encumbered assets, should follow paragraph 2.

206. Diverging views were expressed as to whether paragraph 5 should be retained. One view was that paragraph 5 should be deleted. It was stated that the subjective test it referred to could create circular priority problems (A had priority over B, B had priority over C, C had priority over A). It was also observed that, if retained, to avoid that problem, paragraph 5 should include an objective test along the lines of the test in paragraph 2. The prevailing view, however, was that paragraph 5 should be retained. It was stated that, perhaps with the addition of a reference to "reasonable" reliance, paragraph 5 would be appropriate for policy reasons (those who unreasonably relied on the notice should not be protected) and practical reasons (it might not be too difficult to demonstrate that any alleged reliance was not reasonable). After discussion, the Committee agreed that paragraph 5 should be retained outside square brackets.

207. Subject to the above-mentioned changes, the Committee approved the substance of article 23 of the draft Registry Act.

Article 24 of the draft Registry Act: Post-registration change of grantor's identifier

208. The suggestion was made that articles 24 and 25 of the draft Registry Act should be moved to the third-party effectiveness or the priority chapter, as they dealt with third-party effectiveness and priority issues. That suggestion was objected to. It was stated that those issues related to the registry system and it would be more

logical and transparent to deal with those matters in the Registry Act. It was also pointed out that the enacting State would, in any case, have to decide whether to include the provisions of the Registry Act in their secured transactions law, another law or decree, or a combination thereof. It was also agreed that article 24 of the draft Registry Act should be revised to address the impact of the secured creditor's failure to register an amendment notice. Subject to some drafting changes, the Committee approved the substance of article 24 of the draft Registry Act.

Article 25 of the draft Registry Act: Post-registration transfer of an encumbered asset

209. It was agreed that, for the time being, all options should be retained in article 25 of the draft Registry Act and discussed in the Guide to Enactment. In addition, it was agreed that options A and B should be revised to address successive transfers of an encumbered asset and to clarify that they applied only to transfers of an encumbered asset in which the transferee did not acquire its rights free of the security right. Moreover, it was agreed that the relationship between article 25 of the draft Registry Act and article 42 of the draft Model Law should be further clarified. It was also agreed that, for article 25 of the draft Registry Act to apply to a transferee of an encumbered asset that would be treated as a new grantor, the definition of "grantor" in article 2 of the draft Model Law would need to be revised to include a transferee of an encumbered asset. Subject to those changes, the Committee approved the substance of article 25 of the draft Registry Act.

Article 26 of the draft Registry Act: Appointment of the registrar

210. The Committee approved the substance of article 26 of the draft Registry Act unchanged.

Article 27 of the draft Registry Act: Organization of information in registered notices

211. It was agreed that paragraph 1 of article 27 of the draft Registry Act should be aligned more closely with recommendation 15 of the Registry Guide. In addition, it was agreed that paragraph 2 should be revised to deal with the retrieval of notices that matched closely the search criterion and with global amendment notices. Moreover, it was agreed that the bracketed text in paragraph 3 should be clarified and retained outside square brackets. Subject to those changes, the Committee approved the substance of article 27 of the draft Registry Act.

Article 28 of the draft Registry Act: Integrity of information in the registry record

212. It was agreed that paragraph 2 of draft article 28 of the draft Registry Act should be revised to provide for a direct obligation of the Registry to preserve the registry record and to reconstruct it in the event of loss. It was also agreed that the Guide to Enactment should avoid referring to any particular technique used with respect to the preservation and reconstruction of records. Subject to those changes, the Committee approved the substance of article 28 of the draft Registry Act.

Article 29 of the draft Registry Act: Removal of information from the public registry record and archival

213. It was agreed that a second option should be inserted in paragraph 1 of article 29 of the draft Registry Act to accommodate the "open-drawer approach" (in which no information would be removed from the public registry record) taken in options C and D of article 20. It was also agreed that the Guide to Enactment should explain the various options. Subject to those changes, the Committee approved the substance of article 29 of the draft Registry Act.

2. Adoption of the report of the Committee of the Whole

214. At its 1023rd meeting, on 16 July 2015, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report (see section B.1 above). After considering article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act, the Commission decided to approve their substance.

C. Possible future work in the area of security interests

215. The Commission recalled that, at its twenty-seventh session, Working Group VI had recommended to the Commission the preparation of the Guide to Enactment (A/CN.9/836, para. 121; see para. 167 above). In that connection, the Commission noted that, the Working Group, in preparing the draft Model Law, was mindful of the fact that the model law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering the model law for enactment. In addition, the Commission noted that, in the preparation of the draft Model Law, the Working Group had assumed that the model law would be accompanied by such a guide and referred a number of matters for clarification in that guide.

216. The Commission agreed that the Guide to Enactment should be prepared and referred that task to the Working Group. In addition, the Commission agreed that the Guide to Enactment: (a) should be as short as possible; (b) include cross-references to the Secured Transactions Guide and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the model law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain each option offered in various articles of the model law to assist enacting States in choosing one of the options offered. Moreover, the Commission agreed that, while the Guide to Enactment would have to be considered by the Working Group together with the draft Model Law to ensure consistency between the two texts, that consideration did not need to be as detailed as the consideration of the draft Model Law. Finally, the Commission requested the Working Group to expedite its work so as to submit the draft Model Law to the Commission for final consideration and adoption at its forty-ninth session in 2016.

217. The Commission also noted that, at its forty-third session, it had placed on its future work programme the preparation of a contractual guide on secured

transactions and a uniform law text on intellectual property licensing.[29] After discussion, the Commission decided that those matters should be retained on its future work programme and considered at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting, to be held within existing resources.

D. Coordination and cooperation in the area of security interests

218. The Commission took note with appreciation of the report of the Secretariat about the progress achieved in: (a) the revision of the World Bank Insolvency and Creditor Rights Standard to take into account the key recommendations of the Secured Transactions Guide; (b) the coordination efforts with the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the Assignment Convention, the Secured Transactions Guide and the draft Model Law; (c) the coordination efforts with Unidroit with respect to a fourth Protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment; and (d) the coordination efforts with the International Finance Corporation and the Organization of American States in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.

219. It was widely felt that such coordination and cooperation efforts were extremely important and should continue with a view to ensuring that the work of the Commission on security interests was reflected to the maximum extent possible in the relevant texts of other organizations. After discussion, the Commission renewed its mandate to the Secretariat to continue its coordination and cooperation efforts in the area of security interests.

V. Micro-, small- and medium-sized enterprises (MSMEs): progress report of Working Group I

220. The Commission recalled its decision at its forty-sixth session, in 2013,[30] which was reaffirmed at its forty-seventh session, in 2014,[31] granting to Working Group I the following mandate: "that work on international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies should be added to the work programme" and that "such work should start with a focus on the legal questions surrounding the simplification of incorporation."[32]

221. The Commission considered the reports of the Working Group on the work of its twenty-third session (A/CN.9/825), held in Vienna from 17 to 21 November 2014, and twenty-fourth session (A/CN.9/831), held in New York from 13 to

[29] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.
[30] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.
[31] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.
[32] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

17 April 2015. The Commission commended the Secretariat for the working papers prepared for those sessions and for the reports of those sessions.

222. The Commission noted the work of the Working Group at its twenty-third session in respect of good practices in business registration (A/CN.9/WG.I/WP.85), as well presentations made to the Working Group by the following expert international organizations currently active in the area: the Corporate Registers Forum, the European Business Register and the European Commerce Register's Forum.[33] The Commission noted the continued development of the topic of good practices in business registration through a further exploration of the relevant key principles[34] and that the Working Group had not yet decided on the particular form that any legal text in this regard should take.

223. The Commission also noted the Working Group's consideration at its twenty-third and twenty-fourth sessions of the legal questions surrounding the simplification of incorporation,[35] observing that the deliberations were proceeding through a consideration of the relevant issues as outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, including A/CN.9/WG.I/WP.83, as well as through presentations by States of information on possible alternative legislative models to assist micro-, small- and medium-sized enterprises (MSMEs),[36] and on the text of a draft model law on a simplified business entity.[37] The Commission noted that the draft model law had been prepared as an example in order to assist the Working Group in its consideration of the issues necessary to make progress in its work, but that the Working Group had not yet decided on the form which any legal text on the issues surrounding the simplification of incorporation should take.

224. Some States expressed the view that the Working Group was working outside of its mandate. It was stated that two elements contained in the mandate should be considered as a priority: first, the starting point of the work should be simplified incorporation and second, should be the importance of the issue for developing countries. Other States expressed the view that the Working Group had done that, having considered simplified incorporation along with other approaches to reducing legal obstacles for MSMEs and that the Working Group should continue to do so. Another view was expressed that the Working Group had decided on the appropriate course of its deliberations within the mandate granted by the Commission, and that the Working Group could discuss several issues at the same time.

225. The Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission confirmed the mandate granted to Working Group I (see para. 220 above).

[33] See A/CN.9/825, paras. 12-38.
[34] Ibid., paras. 39-46.
[35] Ibid., paras. 62-79 and A/CN.9/831, paras. 14-77.
[36] A/CN.9/825, paras. 56-61 and A/CN.9/WG.I/WP.87.
[37] See A/CN.9/WG.I/WP.89.

VI. Online dispute resolution: progress report of Working Group III

226. The Commission had before it the reports of the Working Group on the work of its thirtieth and thirty-first sessions (A/CN.9/827 and A/CN.9/833, respectively) and a proposal by Israel (A/CN.9/857) and a proposal by Colombia, Honduras and the United States (A/CN.9/858) related to the work of the Working Group. The Commission considered the reports of Working Group III and the proposals in conjunction with agenda item 18 (Work programme of the Commission) (see paras. 342-353 below).

VII. Electronic commerce: progress report of Working Group IV

227. The Commission recalled that at its forty-fourth session, in 2011, it had mandated Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records.[38] The Commission also recalled that at that session it had welcomed the ongoing cooperation between the Secretariat and other organizations on legal issues relating to electronic single window facilities and had asked the Secretariat to contribute as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail.[39]

228. At its current session, the Commission had before it the reports of the Working Group on the work of its fiftieth session (A/CN.9/828), held in Vienna from 10 to 14 November 2014, and fifty-first session (A/CN.9/834), held in New York from 18 to 22 May 2015. The Commission was informed that current work, which the Working Group decided should take the form of a draft model law on electronic transferable records (A/CN.9/834, para. 12), focused on domestic aspects of the use of electronic transferable records equivalent to paper-based transferable documents or instruments, and that international aspects of the use of those records, as well as the use of transferable records existing only in electronic form, would be addressed at a later stage. It was stated that the Working Group should limit its focus on electronic transferable records equivalent to paper-based transferable documents or instruments. It was added that the possibility of supporting the effective use of a model law on electronic transferable records by providing additional guidance for its implementation in the fields of carriage of goods and of financing might be considered at a later stage.

229. The Commission was also informed about ongoing work in the field of paperless trade, including legal aspects of electronic single window facilities, carried out, in particular, in cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP). It was said that that work could be useful with respect to implementation of article 10.4 of the Trade

[38] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[39] Ibid., para. 240.

Facilitation Agreement adopted in 2014 by members of the World Trade Organisation.[40]

230. Reference was also made to the technical assistance and coordination activities undertaken by the Secretariat, including through the UNCITRAL Regional Centre for Asia and the Pacific (UNCITRAL-RCAP), in the field of electronic commerce.

231. Noting that the current work of the Working Group would greatly assist in promoting the use of electronic communications in international trade, the Commission expressed its appreciation to the Working Group for the progress made in preparing draft provisions on electronic transferable records and commended the Secretariat for its work. Bearing in mind that a model law on electronic transferable records would be accompanied by explanatory materials, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session.

VIII. Insolvency law: progress report of Working Group V

232. The Commission considered the reports of the Working Group on the work of its forty-sixth session (A/CN.9/829), held in Vienna from 15 to 19 December 2014, and forty-seventh session (A/CN.9/835), held in New York from 26 to 29 May 2015. The Commission commended the Secretariat for the working papers prepared for those sessions and for the reports of those sessions.

233. The Commission considered the progress made with respect to the three topics being developed in the Working Group: (a) facilitating the cross-border insolvency of multinational enterprise groups; (b) the obligations of directors of enterprise group companies in the period approaching insolvency; and (c) the recognition and enforcement of insolvency-related judgements.

234. With respect to the work on enterprise groups, the Commission noted that while progress might appear to be slow, discussion in the Working Group was focused on relatively new, very complex issues that had not been widely considered by the international community or resolved in national laws. For those reasons, it was suggested, work might need to be developed in stages to ensure broad understanding of the solutions being considered and to build consensus towards development of a text that would be widely acceptable and implemented. It was observed that if such a text could be achieved it would be a significant step in the development of cross-border insolvency law that could assist in maximizing value for creditors around the world.

235. On the second topic of the obligations of directors of enterprise group companies in the period approaching insolvency, the Commission noted that while the work was already well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced to be able to ensure consistency of approach between the two texts.

236. The Commission welcomed the work on recognition and enforcement of insolvency-related judgement. It was noted that steps had been taken to facilitate

[40] Available from www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

close coordination with the Hague Conference on Private International Law so that progress on the Hague Conference's judgements project could be taken into consideration in the draft text being developed by the Working Group.

237. After discussion, the Commission commended the Working Group for its work on developing legal texts in the three areas noted above. The Commission noted that the Secretariat was continuing to monitor developments with respect to the insolvency of large and complex financial institutions and that a further note might be expected to outline the Financial Stability Board's response to its September 2014 consultative document on the cross-border recognition of resolution actions.

IX. Endorsement of texts of other organizations: Principles on Choice of Law in International Commercial Contracts

238. The Hague Conference on Private International Law requested the Commission to consider possible endorsement of the Principles on Choice of Law in International Commercial Contracts ("Hague Principles").[41]

239. It was noted that the main objective of the Hague Principles is to reinforce party autonomy and to ensure that the law chosen by the parties in international commercial transactions has the widest scope of application, subject to certain limits. In this context, the Commission noted that the Hague Principles, in article 3, allow parties to choose not only the law of a State but also "rules of law", within certain parameters and unless the law of the forum provides otherwise. The Commission noted with approval that that provision might facilitate the choice of UNCITRAL texts, such as the United Nations Sales Convention, where they would not otherwise apply, thus enhancing the harmonizing impact of those texts.

240. Taking note of the usefulness of the Hague Principles in facilitating international trade, the Commission, at its 1010th meeting, on 8 July 2015, adopted the following decision:

> "*The United Nations Commission on International Trade Law*,
>
> "*Expressing its appreciation* to the Hague Conference on Private International Law for transmitting to it the text of the Principles on Choice of Law in International Commercial Contracts ("Hague Principles"),
>
> "*Taking note* that the Hague Principles complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods,[42] and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,[43]
>
> "*Noting* that the preamble of the Hague Principles states that:

[41] A/CN.9/847, and available from www.hcch.net.

[42] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

[43] United Nations publication, Sales No. E.08.V.4.

'1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions,

'2. They may be used as a model for national, regional, supranational or international instruments,

'3. They may be used to interpret, supplement and develop rules of private international law,

'4. They may be applied by courts and by arbitral tribunals,'

"*Congratulating* the Hague Conference on Private International Law on having made a valuable contribution to the facilitation of international trade by promoting the principle of party autonomy and reinforcing choice of law in international commercial contracts,

"*Commends* the use of the Hague Principles, as appropriate, by courts and by arbitral tribunals; as a model for national, regional, supranational or international instruments; and to interpret, supplement and develop rules of private international law."

X. Technical assistance to law reform

A. General discussion

241. The Commission had before it a note by the Secretariat (A/CN.9/837) describing technical cooperation and assistance activities. The Commission stressed the importance of such activities and expressed its appreciation for the related work undertaken by the Secretariat.

242. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors. The Commission also encouraged the Secretariat to seek cooperation and partnership with international organizations, including through regional offices, and bilateral assistance providers in the provision of technical assistance, and appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform.

243. The Commission welcomed the Secretariat's efforts to expand cooperation with the Government of the Republic of Korea on the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business project in the area of enforcing

contracts, to other areas and with other APEC member economies. Support was expressed for the Secretariat's aim to cooperate more closely with APEC and its member economies to improve the business environment in the Asia-Pacific region and to promote UNCITRAL texts.

244. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to the Government of the Republic of Korea, through its Ministry of Justice, and to the Governments of France and Indonesia for their contributions to the Trust Fund since the Commission's forty-seventh session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

245. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to the Government of Austria and to the Commercial Finance Association for contributing to that trust fund since the Commission's forty-seventh session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

246. With regard to the dissemination of information on UNCITRAL's work and texts, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library. The Commission expressed its approval for the library's updated online public access catalogue, in particular with regards to the newly developed six-language interface.[44]

247. The Commission welcomed the inclusion on the UNCITRAL website of interactive status maps for the New York Convention,[45] the UNCITRAL Model Law on International Commercial Arbitration (1985),[46] and the United Nations Sales Convention.[47] The Commission also welcomed the establishment of new social media features, noting that the development of such features in accordance with the applicable guidelines was also welcomed by the General Assembly,[48] and noted with approval the "What's new at UNCITRAL?" Tumblr microblog. The Commission requested the Secretariat to continue to explore the development of new social media features on the UNCITRAL website as appropriate. Finally, recalling the General Assembly resolutions commending the website's six-language interface,[49] the Commission requested the Secretariat to continue to provide, via the

[44] Available from https://unov.tind.io/.

[45] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention_status_map.html.

[46] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration/1985Model_arbitration_status_map.html.

[47] Available from www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status_map.html.

[48] General Assembly resolution 69/115, para. 21.

[49] General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; and 69/115, para. 21.

website, UNCITRAL texts, publications, and related information, in a timely manner and in the six official languages of the United Nations.

B. Consideration of a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

248. The Commission had before it a note by the Secretariat (A/CN.9/845) containing a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms. Recalling its request to the Secretariat at its forty-third session, in 2010, to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through the United Nations Development Programme or other country offices of the United Nations,[50] the Commission considered which steps to take with respect to the draft.

249. Objection was raised by some delegations to formulating UNCITRAL's position with respect to the draft without discussing it in detail. A number of suggestions to improve its wording were made during the session. Some delegations expressed the view that the draft guidance note described some situations and suggested a course of work expected from States and therefore exceeded the framework of an internal note aimed at being applied by internal bodies of the United Nations in general and UNCITRAL in particular. Doubts were raised by some delegations about the appropriateness of the Commission acting on a document intended for the internal use of the United Nations Secretariat.

250. Other delegations considered it appropriate for the Commission to act on the document, which was intended to be widely used across the United Nations and expected to produce impact on States. They therefore welcomed its discussion in the Commission. The narrow scope and purpose of the intended document as a tool to increase awareness across the United Nations about the importance of sound commercial law reforms and the use of internationally accepted commercial law standards in that context was emphasized. While the Commission noted that the draft generally reflected that scope and fulfilled that purpose, it was suggested that renaming the document might help to better convey its intended narrow scope and purpose. On the other hand, concerns were expressed about the content of the draft guidance note in relation to the UNCITRAL mandate.

251. After discussion, the Commission requested States to provide to its secretariat any suggestion for revision of the text and, in formulating such suggestions in writing, to keep in mind the intended scope and purpose of the document, which, to be usable by its expected readers, should remain short, concise and simple. It was agreed that the compilation of all comments received from States would be circulated by the Secretariat to all States together with a revised version of the text. It was understood that, if agreement of States on the revised text could be achieved before or during the consideration of the Commission's report in the Sixth Committee of the General Assembly in 2015, the Sixth Committee itself might

[50] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 336.

wish to endorse the text, so as to avoid delay in issuing the document. Otherwise, the matter might need to be brought back to the Commission for consideration at its next session.

252. The Secretariat was requested, in revising the text, to follow closely the wording of General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL and avoid embarking into areas not directly linked to the UNCITRAL mandate. The Secretariat was also requested to allocate sufficient time for consideration of the revised text at the next session if the revised text had to be considered at that time, and to make provisions for specific time to be allotted to that item in the provisional agenda of that session.

XI. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

253. The Commission considered document A/CN.9/840 "Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts", which provided information on the current status of the CLOUT system and of the digests of case law relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration.

254. The Commission expressed its continuing belief that CLOUT and digests were an important tool for promoting uniform interpretation of UNCITRAL texts and noted with appreciation the increasing number of UNCITRAL legal texts that were currently represented in CLOUT. As at 11 May 2015, 155 issues of compiled case-law abstracts had been prepared, dealing with 1,454 cases. The cases related to the following texts:

- The New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)[51] and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)[52]
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[53]
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[54]
- United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[55] ("Electronic Communications Convention")
- Model Law on Arbitration

[51] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[52] Ibid., vol. 1511, No. 26121.
[53] Ibid., vol. 1695, No. 29215.
[54] Ibid., vol. 2169, No. 38030, p. 163.
[55] General Assembly resolution 60/21, annex.

- UNCITRAL Model Law on International Credit Transfers (1992)[56]

- UNCITRAL Model Law on Electronic Commerce, 1996[57]

- UNCITRAL Model Law on Cross-Border Insolvency (1997)[58]

- UNCITRAL Model Law on Electronic Signatures (2001)[59]

255. The Commission was informed that, while the majority of the abstracts published still originated from Western European and other States, there was a small increase in the number of abstracts from Eastern European States and from African States.

256. The Commission took note that new national correspondents had been appointed, including after document A/CN.9/840 (see para. 253 above) had been issued, and that the network of national correspondents was composed of 73 experts representing 35 countries. The Commission was also informed that since the note of the Secretariat to the forty-seventh session of the Commission in 2014 (A/CN.9/810), national correspondents had provided approximately 47 per cent of the abstracts published in CLOUT.

257. The Commission expressed its appreciation that the French version of the third edition of the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) had been translated and that the digest was now available in the six official languages of the United Nations on the UNCITRAL website as well as on CD-ROM. The latter format was considered to be particularly useful for technical assistance and coordination activities.

258. The Commission also commended the continued effort of its secretariat in the promotion of both the *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012) and the *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, and took note of the progress on the finalization of the digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency.

259. The Commission noted with appreciation the performance of the website www.newyorkconvention1958.org and the successful coordination between that website and the CLOUT system. It also welcomed the upgraded CLOUT database and noted with particular interest its improved features that resulted in a more user-friendly interface which allowed for faster as well as a more detailed search of material.

260. As in previous sessions, the Commission expressed its appreciation for the work of the Secretariat on CLOUT, once again noting the resource-intensive nature of the system and acknowledging the need for further resources to sustain it. The Commission thus appealed to all States to assist the Secretariat in its search for available funding at the national level to ensure sustained operation of the system.

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[56] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

[57] General Assembly resolution 51/162, annex.

[58] General Assembly resolution 52/158, annex.

[59] General Assembly resolution 56/80, annex.

XII. Status and promotion of UNCITRAL texts

261. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/843). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-seventh session.

262. The Commission also noted the following actions and legislative enactments made known to the Secretariat subsequent to the submission of the Secretariat's note:

(a) New York Convention — accession by Andorra (156 States parties);

(b) United Nations Sales Convention — withdrawal of declarations by Hungary (83 States parties);

(c) Electronic Communications Convention — ratification by Sri Lanka[60] (7 States parties);

(d) Mauritius Convention on Transparency — signature by Italy and ratification by Mauritius (1 State party);

(e) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 — enactment of the Model Law in Slovakia (2014) and enactment of the Model Law as amended in 2006 in Bahrain (2015) and Bhutan (2013);

(f) UNCITRAL Model Law on Electronic Commerce (1996) — enactment in Honduras (2015); and

(g) UNCITRAL Model Law on International Commercial Conciliation (2002) — enactment in Bhutan (2013).

263. The Commission noted with appreciation the inclusion in document A/CN.9/843 of certain information related to the status of the UNCITRAL Arbitration Rules[61] and the UNCITRAL Transparency Rules. The Commission requested the Secretariat to make this information available on the UNCITRAL website (www.uncitral.org) in the six official languages of the United Nations.

264. Considering the broader impact of UNCITRAL's texts, the Commission also took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/839) and noted with appreciation the increased influence of UNCITRAL legislative guides, practice guides and contractual texts. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental

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[60] Upon ratification, Sri Lanka declared: In accordance with articles 21 and 19 (para. 2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, the Convention shall not apply to electronic communications or transactions specifically excluded under Section 23 of the Electronic Transactions Act No. 19 of 2006, of Sri Lanka.

[61] UNCITRAL Arbitration Rules (as revised in 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I; UNCITRAL Arbitration Rules (1976), ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

organizations active in the field of international trade law. In this regard, the Commission requested non-governmental organizations invited to the Commission's annual session to donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review. The Commission expressed appreciation to the editors of the *International Journal of Arab Arbitration, IHR: International Commercial Law and Journal du droit international (Clunet)* for their donation of current and forthcoming issues of these journals.

XIII. Coordination and cooperation

A. General

265. The Commission had before it a note by the Secretariat (A/CN.9/838) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission (A/CN.9/809). The Commission also had before it a note by the Secretariat (A/CN.9/851, paras. 6-13) providing information on developments in the field of sovereign debt restructuring, which had mentioned the work of the Commission in the fields of insolvency law and arbitration. The Commission expressed appreciation for the Secretariat engaging with a high number of organizations both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: UNCTAD, the United Nations Economic Commission for Europe, the United Nations Environment Programme, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the World Bank, the World Trade Organization, APEC, the Hague Conference on Private International Law, OECD and Unidroit.

266. By way of example of current efforts, the Commission took note with satisfaction of the coordination activities involving the Hague Conference on Private International Law and Unidroit as well as the activities on the rule of law in those areas of work of the United Nations and other entities that were of relevance for the work of UNCITRAL.

267. The Commission also noted that the Secretariat participated in expert groups, working groups and plenary meetings with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products. The Commission further observed that coordination work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of such work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

B. Coordination and cooperation in the field of international arbitration and conciliation

268. The Commission noted with appreciation the ongoing cooperation and coordination efforts of the Secretariat with organizations active in the field of international arbitration and conciliation. The Commission further noted that UNCITRAL standards in that field were characterized by their flexibility and

generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration. In that light, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reforms had been formulated by a number of organizations. In that context, the Commission was further informed that the Secretariat was conducting a study on whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development Studies. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter. In addition, the Commission took note of the statements made by the following intergovernmental organizations.

1. UNCTAD

269. The representative of UNCTAD mentioned that the UNCITRAL Transparency Rules and the Mauritius Convention on Transparency constituted an important contribution to the comprehensive reform of the international investment agreements (IIA) regime and reported on the main activities of UNCTAD in the field of IIAs and investor-State dispute settlement, which included research and analysis, technical assistance and intergovernmental consensus building. The Commission was informed that UNCTAD had devoted an extensive part of its work developing potential solutions to the challenges that the IIA regime was currently facing. The World Investment Report published by UNCTAD in 2015 offered an action menu for IIA reforms, building on views that emerged at recent intergovernmental and multi-stakeholder meetings organized by UNCTAD as well as its earlier work in that area, and based on the guiding principle that sustainable development should be the overall objective of IIA reforms.

270. The Commission was informed that the 2015 World Investment Report offered policy options for IIA reforms in key areas (such as IIA clauses, investment dispute settlement and systemic issues) and at different levels of policymaking (national, bilateral, regional and multilateral levels). Options for reform included reforming the mechanism of investment arbitration under the current structure or replacing it; the latter could include the creation of a standing international investment court, reliance on State-State dispute settlement, and/or reliance on domestic judicial systems of the host State.

2. ICSID

271. The Secretary-General of ICSID provided a general outline of ICSID's activities in the field of investor-State arbitration. It was stated that ICSID had administered approximately 70 per cent of all known investment cases under the ICSID rules, the UNCITRAL Arbitration Rules and ad hoc, and that its caseload had increased in recent years, having registered 52 cases in the past fiscal year. The Commission was informed of the efforts by ICSID to provide cost- and

time-efficient services by making use of the World Bank offices around the world, developing best practices and making better use of technology, while ensuring that due process and the equality of the parties were respected. The Commission also took note of the technical assistance and knowledge management activities of ICSID to provide information about investor-State dispute settlement through its new website and publications as well as by conducting training sessions. With respect to reform initiatives in the field of investor-State arbitration, it was highlighted that States were the primary custodians of such initiatives in their investment treaties and contracts, and that ICSID would continue to contribute its expertise and experience to implement those initiatives by working closely with its member States, the Commission and other organizations.

3. PCA

272. The representative of PCA informed the Commission of the activities of PCA, particularly under the UNCITRAL Arbitration Rules. It was mentioned that PCA had administered over 110 investor-State arbitrations, the great majority of which were conducted pursuant to the UNCITRAL Arbitration Rules. The Commission also took note of PCA's role as designating and appointing authority in connection with the UNCITRAL Arbitration Rules, where a significant proportion of requests received by PCA concerned challenges to arbitrators. It further took note of the transparent proceedings administered by PCA and possible cooperation in reform efforts in the field of investor-State dispute settlement.

4. OECD

273. The representative of OECD informed the Commission of its recent initiatives, which might be of particular interest to the Commission. Firstly, the Commission was informed that OECD hosted an intergovernmental forum, called the Freedom of Investment Roundtable (the "Roundtable"), which had been engaged in work on investor-State arbitration and investment law since 2011. It was noted that the Roundtable, which was attended by a wide range of States in addition to the members of the OECD, had demonstrated the value of exchanges of experience and best practices relating to investment treaties. In addition, the Commission was informed that OECD held this year its third Global Forum on Responsible Business Conduct and that OECD's work on responsible business conduct built on the OECD Guidelines for Multinational Enterprises and its mechanisms for implementation. It was also noted that the OECD Policy Framework for Investment (PFI) had recently been updated, which addressed numerous policy areas (including investment policy, investment promotion and facilitation, investment in support of green growth as well as policies on competition, trade and taxation), all of which contributed to the investment climate. It was stated that such an integrated approach could help governments in improving the investment climate and achieving other public policy goals.

5. Energy Charter Secretariat

274. The representative of the Energy Charter Secretariat informed the Commission about the secretariat's role in the implementation of the Energy Charter Treaty, the only existing multilateral investment treaty among 54 States providing investment arbitration as a tool for the protection of energy investments. It was mentioned that

at the occasion of the Ministerial Conference on the International Energy Charter at The Hague on 20-21 May 2015, the importance of full access to adequate dispute settlement, including national mechanisms and international arbitration, was restated. Particular attention was drawn to the activity by the Investment Group of the Energy Charter Conference, in close cooperation with UNCITRAL, ICSID, PCA, International Chamber of Commerce (ICC) and SCC and with the assistance of IMI, for the implementation of article 26 of the Energy Charter Treaty, allowing mediation of energy investment disputes and to remove obstacles to mediation.

C. Reports of other international organizations

275. The Commission took note of statements made on behalf of the following international intergovernmental and non-governmental organizations: Unidroit, Hague Conference on Private International Law and ICANN, a summary of which is reported below.

1. Unidroit

276. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-seventh session of UNCITRAL, in 2014. The Commission was in particular informed about the following:

(a) **Completion of the Legal Guide on Contract Farming**, authored in collaboration with the Food and Agriculture Organization of the United Nations (FAO), and the International Fund for Agricultural Development (IFAD). The Legal Guide intends to raise awareness on the legal dimension of contract farming and enhance fair and economically beneficial relationships between agricultural producers and contractors. The text is also intended to serve as a "good practice" reference by providing guidance for parties engaged in contract farming operations, and for policymakers in the context of the formulation of public governance instruments to sustain agricultural development. Appreciation was expressed to UNCITRAL for providing comments on the Guide during its preparation. It was noted that the Guide, approved by the Unidroit Governing Council in May 2015, would be launched at an event in Rome on 28 July 2015 and that IFAD had granted funds to support various follow-up activities planned by FAO, under the supervision of a steering committee in which the three organizations participate;

(b) **The Convention on International Interests in Mobile Equipment**[62] **("Cape Town Convention")** continued to attract new accessions and had reached the number of sixty-six contracting States. Participation in the Aircraft Protocol to the Convention had increased as well and currently the Protocol had fifty-eight States parties. There were also developments with regard to protocols to the Cape Town Convention. Since the last Commission session, in 2014, the European Union had approved the Rail Protocol, this approval would be instrumental to ratification of this text by States and its entry into force; a third session of the Space Protocol Preparatory Commission had been held and had largely finalized the draft Regulations for the international registry; significant progress had also been made on the future fourth Protocol on matters specific to

[62] Available from www.unidroit.org/instruments/security-interests/cape-town-convention.

agricultural, mining and construction equipment, for which Study Group meetings had been held. The development of such Protocol continued and it was anticipated that it would move to the intergovernmental negotiation stage in 2016. Unidroit's appreciation for UNCITRAL's involvement in developing the Protocol was expressed and it was noted that the UNCITRAL secretariat had attended the first Study Group meeting;

(c) Unidroit continued to be active in the field of international commercial contracts and had created a restricted Working Group to consider developing possible amendments and additions to the black-letter rules and comments of the current edition of **the Principles of International Commercial Contracts** in order to address the special needs of long-term contracts. The Working Group, whose first meeting was attended by the UNCITRAL secretariat, considered amendments relating to contracts with open terms, agreements to negotiate in good faith, supervening events, termination for compelling reasons and post-contractual obligations. The second meeting to finalize the proposed amendments and additions to the black-letter rules was expected to be held in October 2015;

(d) Unidroit also continued to work with ELI to adapt the American Law Institute (ALI)/Unidroit **Principles of Transnational Civil Procedure (2004)** to the specificities of European regional legal cultures with a view to drafting Europe-specific regional rules. Five Working Groups had been established to consider (i) access to information and evidence; (ii) provisional and protective measures; (iii) service of documents and due notice of proceedings; (iv) *lis pendens* and *res judicata*; and (v) obligations of the parties and lawyers. The Working Groups first met in November 2014 in a joint meeting with the Steering Committee and a second meeting of the Steering Committee and Chairs of the Working Groups was subsequently held in Brussels in April 2015. It was expected that work on this topic could be completed in three to four years;

(e) Celebrations of the twentieth anniversary of the **1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects** took place in Rome (8 May 2015) and provided an opportunity to assess the significance, the distinctive features and operational aspects of this normative instrument;

(f) As the year 2016 will mark **Unidroit's ninetieth anniversary**, Unidroit was planning a one-day high-level special session of the Unidroit General Assembly, tentatively scheduled for 20 April 2016, to discuss the role and place of private law in supporting the implementation of the international community's broader cooperation and development objectives. UNCITRAL was invited to be represented at the highest level at such an event and to chair a panel devoted to commercial law and the rule of law to highlight the important contribution of the Commission in this field.

2. The Hague Conference on Private International Law

277. A representative of the Permanent Bureau expressed appreciation for the continuing cooperation between The Hague Conference, Unidroit and UNCITRAL. It was noted that, in the context of such cooperation, The Hague Conference had on various occasions shared its expertise in projects of private international law of common interest to the three organizations, and that it was ready to further contribute to other similar projects in the future.

3. ICANN

278. The Commission was informed about the mandate and the work of ICANN. A not-for-profit corporation, established under the laws of California (United States), ICANN deals with Internet security, stability and interoperability. In particular, the organization is responsible for the coordination of the Internet's naming system, i.e. the Domain Name System, through which ICANN contributes to maintain an open and interoperable Internet. Appreciation was expressed for ICANN's participation, as an observer, in the work of UNCITRAL Working Group IV (Electronic Commerce).

D. International governmental and non-governmental organizations invited to sessions of UNCITRAL

279. At its current session, the Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.[63] In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL had long-standing cooperation and which had been invited to sessions of the Commission. The Commission also recalled that, further to its request,[64] the Secretariat had adjusted the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and the modality of communicating such information to States, and the adjustments made were to the satisfaction of the Commission.[65]

280. The Commission took note that since its forty-seventh session, in 2014, the following organizations had been added in the list of non-governmental organizations invited to sessions of UNCITRAL: the Brazilian Chamber of Electronic Commerce (www.camara-e.net); the Center of Arbitration of the Chamber of Commerce of Lima (www.camaralima.org.pe); International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (www.ucci.org.ua/arb/icac/en/icac.html) (ICAC); IFG (www.ifgroup.com); and the New York International Arbitration Center (nyiac.org) (NYIAC). The Commission requested the Secretariat, when presenting its oral report at future sessions of the Commission on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite non-governmental organizations.

281. The Commission also took note that, pursuant to General Assembly resolutions 68/106 and 69/115 (paragraph 8 in both resolutions), all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about rules of procedure and work methods of UNCITRAL. Such a reminder is effectuated by inclusion in invitations issued to them of a reference to a dedicated web page of the UNCITRAL website where main official documents of

[63] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex III.

[64] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 288-298.

[65] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 176-178.

UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed. (For the deliberations of the Commission on coordination and cooperation in the area of security interests, see paras. 218-219 above.)

XIV. UNCITRAL regional presence

282. The Commission had before it a note by the Secretariat (A/CN.9/842) on the activities undertaken by UNCITRAL-RCAP.

283. In an oral report by the head of UNCITRAL-RCAP, reference was made to the close cooperation with the host country of UNCITRAL-RCAP, the Republic of Korea, and in particular its Ministry of Justice, namely by the joint organization of several regional conferences and technical assistance initiatives, such as the 2015 UNCITRAL Asia-Pacific Incheon Spring Conferences and the third ADR Asia-Pacific Conference.

284. Strong support was expressed, in particular, for the various activities undertaken by UNCITRAL-RCAP which aimed at long-term capacity-building ensuring legal uniformity and general economic stability in Asia and the Pacific, in close cooperation and coordination with institutions active in trade law reform in the region.

285. It was recognized that the growing relevance of UNCITRAL-RCAP and its innovative approaches promoted the harmonization and modernization of international trade law standards in the context of economic integration and cooperation frameworks, and actions undertaken in the context of regional organizations, in particular the ASEAN Economic Community, APEC, the Gulf Cooperation Council and the South Asian Association for Regional Cooperation, were encouraged.

286. The Commission reiterated the importance of the mandate given to UNCITRAL-RCAP and expressed firm encouragement and support for its wide range of activities, namely the educational and outreach programmes, emphasizing its growing significance in increasing regional contributions to the work of UNCITRAL.

287. In response to a suggestion to hold a session of a working group in the Asia-Pacific region, the Secretariat was requested to assess such feasibility taking into account the budget situation and the long tradition of holding those sessions in Vienna and New York.

288. The proposal to host a celebratory event in the Asia-Pacific region on the occasion of the 50th anniversary of the establishment of UNCITRAL was supported.

289. The Commission acknowledged with gratitude the financial and in-kind contributions of the Government of the Republic of Korea to the operation of UNCITRAL-RCAP and to its specific activities, as well as that of other contributors.

290. The Government of the Republic of Korea stated its continued willingness to support the operation of UNCITRAL-RCAP, possibly by extending its financial contribution beyond 2017. Furthermore, in that context, a suggestion was made that it would be desirable for UNCITRAL-RCAP to become a permanent regional office

through assistance from States in the region and possibly through the United Nations regular budget.

291. The Commission reiterated that, in light of the importance of a regional presence for raising awareness of UNCITRAL's work and, especially, for promoting the adoption and uniform interpretation of UNCITRAL texts, and in view of the successful activities of UNCITRAL-RCAP, further efforts should be made to emulate its example in other regions. The Secretariat was requested to pursue consultations regarding the possible establishment of other UNCITRAL regional centres and/or capacity-building centres.

292. In that context, while concern was raised on the already limited resources of the UNCITRAL secretariat to monitor and support regional activities, a balanced approach was encouraged to ensure that benefits resulting from the establishment of additional regional centres outweigh any related cost associated with time spent by the UNCITRAL secretariat, recognizing that such centres are beneficial to all States and for the efficient global implementation of UNCITRAL standards.

293. The Commission was informed of the specific offer received to establish a UNCITRAL regional centre in Colombia, which gathered support from States.

XV. Role of UNCITRAL in promoting the rule of law at the national and international levels

A. Introduction

294. The Commission recalled that the item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on the agenda of the Commission since its forty-first session, in 2008,[66] in response to the General Assembly's invitation to the Commission to comment, in its report to the General Assembly, on the Commission's current role in promoting the rule of law.[67] The Commission further recalled that since that session, the Commission, in its annual reports to the General Assembly, had transmitted comments on its role in promoting the rule of law at the national and international levels, including in the context of post-conflict reconstruction. It expressed its conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels.[68] That view had been endorsed by the General Assembly.[69]

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[66] For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, paras. 111-113.

[67] General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; and 68/116, para. 14.

[68] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 413-419; ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 299-321; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195-227; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 267-291; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 215-240.

295. At its forty-eighth session, the Commission heard an oral report by the Secretariat on the implementation of the relevant decisions taken by the Commission at its forty-seventh session.[70] A summary of the report and decisions of the Commission related thereto are contained in section B below.

296. The Commission took note of General Assembly resolution 69/123 on the rule of law at the national and international levels, by paragraph 17 of which the General Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. The Commission decided to focus its comments to the General Assembly this year on the role of its multilateral treaty processes in promoting and advancing the rule of law in line with paragraph 20 of that resolution. The comments were formulated following a panel discussion with participation of invited experts. The comments and a summary of the panel discussion are contained in section C below.

297. The Commission also took note of paragraphs 1 and 15 of that resolution and the Secretary-General report A/68/213/Add.1 in which the Secretary-General expressed the view that a closer interaction between the General Assembly and UNCITRAL should be explored in developing the linkages between the rule of law and the three pillars of the United Nations: peace and security, human rights and development. The Commission noted its relevance to that discussion and endorsed Secretariat efforts towards reflecting UNCITRAL's views in the analytical summary to be prepared under paragraph 15 of the resolution.

B. Implementation of the relevant decisions taken by the Commission at its forty-seventh session

298. On behalf of the Chairman of UNCITRAL's forty-seventh session, it was reported that efforts had been made to reflect in negotiations of the post-2015 development agenda and in an outcome document of the Third International Conference on Financing for Development to be held in Addis Ababa on 13-16 July 2015 the importance of harmonized and modernized international commercial law framework for implementation of the post-2015 development agenda. A paragraph acknowledging the relevance of UNCITRAL's work in the financing for development context was proposed for inclusion in the outcome document of the Conference and was supported by a number of States. The Commission welcomed the proposal and expressed the hope that it would be retained in the final outcome document.

299. The Commission noted developments related to the United Nations rule of law agenda since its forty-seventh session, in particular the integration of rule of law as a target in the post-2015 development agenda, the relevance of UNCITRAL's work to a number of other envisaged targets in the post-2015 development agenda and ongoing work on indicators that would accompany sustainable development goals and targets to be adopted in September 2015.

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[69] Resolutions 63/120, para. 11; 64/111, para. 14; 65/21, paras. 12-14; 66/94, paras. 15-17; 67/89, paras. 16-18; 68/106, para. 12; and 69/115, para. 12.

[70] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 228.

300. The Commission expressed its appreciation to the Chair of the forty-seventh session of UNCITRAL, Mr. Choong-hee HAHN (Republic of Korea), for his significant efforts towards increasing awareness of UNCITRAL's work across the United Nations system and for bringing issues of harmonization and modernization of the law of international trade to the discussions of the post-2015 development agenda and financing for development. It requested States members of UNCITRAL, its Bureau at the current session and its secretariat to take appropriate steps to ensure that the positive developments related to UNCITRAL are retained and if possible reinforced, in subsequent stages of negotiation, adoption and implementation of the post-2015 development agenda, in particular in the outcome documents of the Addis Ababa Conference and the 2015 Summit and in the indicators that would accompany the sustainable development goals and targets.

301. The Commission recalled its call to its secretariat to continue exploring synergies and expanding outreach to delegations of States to various United Nations bodies with the view of increasing their awareness of the work of UNCITRAL and its relevance to other areas of work of the United Nations.[71] Support was expressed for outreach to various bodies of the United Nations system operating at a country level with the mandate to assist with local law reforms, be it in the promotion of the rule of law, development or other context, so that they appropriately factor in their work the promotion of the rule of law in commercial relations generally and UNCITRAL standards in particular.

C. UNCITRAL comments to the General Assembly

1. Summary of the panel discussion on the role of UNCITRAL multilateral treaty processes in promoting and advancing the rule of law

302. Speakers referred to General Assembly resolution 67/1 that recognized the role of UNCITRAL and the law of international trade in the rule of law and development contexts. They felt that more should be done to achieve the understanding of the United Nations rule of law activities as also encompassing promotion of rule-based commercial relations.

303. According to speakers, more should also be done towards increasing awareness across the United Nations system about relevance of the work of UNCITRAL to the implementation of the international development agenda. In particular, aspects of international trade facilitation discussed across the United Nations system and beyond should not overlook the need for removing or reducing legal obstacles to the flow of international trade. Outreach should be to the entire spectrum of United Nations bodies relevant to the work of UNCITRAL, including specialized agencies.

304. On the role of UNCITRAL multilateral treaty processes in promoting and advancing the rule of law, the invited speakers focused on: (a) initiation of a treaty process; (b) treaty-making process; and (c) treaty implementation. They discussed the linkages among those three stages of multilateral treaty processes and the impact of each separately and all cumulatively on the quality of a treaty, its acceptance by

[71] Ibid., para. 284.

States and intended end-users, and the promotion of the rule of law in commercial relations.

305. The need for close coordination with all relevant stakeholders at all stages of multilateral treaty processes was emphasized in order to avoid duplication, conflicting results and lost opportunities to advance the rule of law through the process. Suggestions were made for increasing cooperation and coordination in particular with regional bodies.

306. The technical and apolitical nature of the law of international trade (i.e. law regulating commercial relations between private parties as opposed to trade relations among States) was cited among factors that facilitated UNCITRAL's standard-setting activities. Linking UNCITRAL's treaty-making processes too closely to multilateral trade agreement processes should be discouraged since the latter processes often led to political compromises that had little to do with the assessment of economic and contract practice effects of standards being prepared.

307. Different types of United Nations treaties emanated from the work of UNCITRAL were recalled. Some treaties harmonized existing legal systems (e.g. the United Nations Sales Convention) while others recorded an agreement on economic results-based rules (e.g. the Assignment Convention). Some UNCITRAL instruments combined both elements — harmonization of developed legal regimes on some aspects and economic results-based approaches prevailing only in a minority of jurisdictions on some other aspects.

308. The positive economic and rule of law effect of all treaties, including those allowing declarations by States and derogations by private parties, was emphasized. It was argued that certainty and predictability were still ensured through treaties allowing declarations since the extent of modification through the declaration was known to commercial parties in advance. Treaties with party autonomy provisions, even though they might not be applicable to particular transactions, still promote "best practice" rules, avoiding unnecessary regulation.

309. In the context of **initiation of a treaty-making process in UNCITRAL**, during the panel discussion and ensuing discussion, the importance of the timely selection of the appropriate subject for regulation by a treaty was emphasized. Means of achieving that, in particular through closer collaboration with development banks, other development assistance agencies and business communities, were discussed. From African development perspectives, the following areas for possible work by UNCITRAL were highlighted in particular: regulation of transit carriers; enforcement of judgements; insolvency of natural persons; franchising; technology transfer; distribution and agency contracts; and natural resources exploitation. The need for further harmonization work in areas already tackled by UNCITRAL or currently being tackled — public procurement, construction contracts, infrastructure projects, international payments and electronic commerce — was also highlighted.

310. Citing specific examples, speakers noted that choosing between a treaty and other types of instruments (a model law or legislative guide) was not always a straightforward choice and the final choice might be made when a standard was already being elaborated. Identifying at the very early stage the primary beneficiaries of a standard was necessary in order to ensure the correct approach to regulation. The impact of that initial stage of the treaty process on the subsequent

fate of the treaty was underscored. There were examples in UNCITRAL's practice proving the effectiveness of a "soft law" approach at the initial stages of harmonization: the widespread use of "soft law" standards made achieving a higher-level of unification through a treaty more realistic and the treaty elaborated in the end was more easily implemented.

311. In the context of **treaty-making processes**, speakers discussed work methods of UNCITRAL aimed at inclusiveness, publicity and reconciling various views and interests of negotiating parties. By bringing together experts from Governments, private sector and other institutions, UNCITRAL promoted a dialogue across nations, cultures and interests. That dialogue was not always easy taking into account differences in local regulation of private law matters addressed by UNCITRAL, legal traditions and level of development of countries; solutions thus by necessity were based on compromises.

312. The understanding in UNCITRAL of consensus as a "substantially prevailing majority", practices of reaching it and the active role of invited non-governmental organizations in negotiation were cited as features making UNCITRAL's standard-making processes distinct from those of other United Nations bodies and contributing to the quality of its standards. The effectiveness of UNCITRAL's treaty-making processes is recognized by the well-established practice of the General Assembly to adopt conventions prepared by UNCITRAL by consensus rather than sending them for finalization and adoption by diplomatic conferences.

313. In the context of **treaty implementation**, speakers noted that the quality of treaty-initiation and treaty-making processes and of a treaty itself did not guarantee the adoption of the treaty by the international community. Reasons were various, including that solutions in the treaty became outdated or came in conflict with regional economic integration commitments. The capacity to properly implement a treaty (existence of the required institutions, procedures and professional cadre) was also an issue for many countries.

314. On the other hand, informal ways of treaty implementation were also becoming widespread: treaty provisions were being used by commercial parties as contractual clauses or incorporated by various rule-formulating or law reform assistance agencies in "soft law" instruments (e.g. regional model laws or guidance documents). There were also examples when courts, in the absence of adequate national regulation of questions covered by a treaty, applied the treaty, by this improving conditions for trade on the territory of the State. There were also examples when a treaty had influenced model norms at the regional level and was transposed to national systems in full or in part through a regional harmonization instrument.

315. Speakers highlighted the importance for effective implementation of treaties of achieving their uniform interpretation and application. The role of CLOUT and digests was important in that respect since they assisted courts to achieve autonomous interpretation of UNCITRAL standards with due regard to their international character and avoiding influence of national approaches. National approaches might be inadequate, especially in countries without well-established jurisprudence on commercial law matters. The UNCITRAL secretariat was encouraged to continue its efforts towards promoting uniform interpretation and

application of UNCITRAL standards and support of such efforts by various stakeholders was welcomed.

316. In addition, the continuing efforts of the UNCITRAL secretariat to provide technical assistance to States with their commercial law reforms despite its limited resources were praised. The need for outreach to a wide range of possible partners to expand that work and at the same time to address the issue with the shortage of resources was highlighted. Desirability of establishing a dedicated international body responsible for promoting, enacting, monitoring and implementing UNCITRAL treaties and various ways to build and sustain it were discussed. All those efforts could in no way undermine the active role of States and relevant intergovernmental and non-governmental organizations in promoting, enacting, monitoring and implementing UNCITRAL treaties.

317. Finally, the idea of a uniform code of international trade law that was discussed in the early years of UNCITRAL was recalled. Doubts were expressed that concerns that led to abandoning at that time the idea of preparing such a code by UNCITRAL disappeared. It was nevertheless not excluded that at some point in future all internationally accepted standards in the area of the law of international trade might need to be consolidated to ensure the proper interlinkage and coherence among them, and UNCITRAL might consider taking some preliminary steps towards that end, for example preparing a concept note for a future code.

2. Comments by the Commission

318. The Commission expressed its appreciation to the panellists for their statements and noted that their statements reinforced the conviction expressed by the General Assembly and the Commission that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels.

319. In the particular context of the role of its multilateral treaty processes in promoting and advancing the rule of law, the Commission recalled its mandate to further the progressive harmonization and unification of the law of international trade in particular by (a) preparing international conventions in the field of the law of international trade, (b) promoting the codification and wider acceptance of international trade terms, provisions, customs and practices in collaboration, where appropriate, with other organizations operating in the field, (c) promoting wider participation in them, and (d) promoting ways and means of ensuring their uniform interpretation and application.

320. The Commission recalled that most treaties developed through its work had been adopted by the General Assembly. It was noted that the inclusive, transparent and consensus-based standard-making processes in UNCITRAL support the value and importance of UNCITRAL as a body devoted to harmonization and unification of the law of international trade, and promote international acceptance of its work.

321. The Commission identified important features of the field in which it operated: (a) flexibility (because party autonomy was the general norm); (b) dynamism (because business practices evolved rapidly and with that the need to adjust their regulation); and (c) influence by different legal systems and *lex mercatoria*. These features explain UNCITRAL's considered approach to initiating any standard-setting activity and drafting techniques aimed at reconciling interests of various

stakeholders in a balanced and neutral way. For example, if a high degree of harmonization could not be achieved, or a greater degree of flexibility was desired and was appropriate to the subject under consideration, a technique of harmonization other than a treaty, such as a model law or legislative guide, was used.

322. During forty-eight years of UNCITRAL's work, the Commission formulated ten multilateral treaties, five of which have entered into force. The number of States parties to UNCITRAL conventions that entered into force is within the range of six to thirty-four, the exception being the United Nations Sales Convention with eighty-three State parties. The most recent treaty prepared by UNCITRAL is the Mauritius Convention on Transparency, adopted on 10 December 2014, which provided for the retrospective application of the UNCITRAL Transparency Rules. UNCITRAL's treaties and other instruments seek to balance the interests of States and commercial parties. In addition to numerous UNCITRAL model laws, rules and guides, they established international standards for the practice in the areas that they addressed.

323. The Commission noted that it was also a custodian of the New York Convention, a treaty with 156 State parties as of today. The Convention embodies a set of criteria and an agreed procedure by which arbitration agreements and awards are to be recognized and enforced in the courts of all States parties, thereby lending certainty and predictability to the regime of international commercial arbitration. By making the regime of commercial arbitration essentially global in scope, the New York Convention makes a substantial contribution to advancing and promoting access to justice in the resolution of commercial disputes (access to justice being another important component of the rule of law). The Commission monitors the effective implementation of that Convention and promotes its uniform interpretation and application. The Commission recalled that UNCITRAL projects related to that Convention, including the adoption by UNCITRAL at its thirty-ninth session, in 2006, of a recommendation regarding the interpretation of some provisions of the New York Convention and the preparation of the UNCITRAL Secretariat Guide on the New York Convention, were noted with appreciation by the General Assembly.[72]

324. The Commission brought to the attention of the General Assembly issues related to its treaty processes requiring attention:

(a) The need to achieve increased participation of all countries in UNCITRAL's rule-formulating work in order to encourage acceptance of that work. The local capacity of States from various regions, legal systems and different levels of development, including least-developed countries and small-island developing countries, to fully engage in debate and negotiation in UNCITRAL should be enhanced. Increased participation in UNCITRAL's rule-formulating work contributes to building such capacity and to the local capacity to implement sound commercial law reforms;

(b) The need to further develop coordination mechanisms among the various rule-formulating bodies in the field of the law of international trade at the international and regional levels. Mechanisms to achieve closer coordination in particular with regional economic integration organizations would be welcome. The

[72] General Assembly resolutions 61/33, para. 2, and 69/115, para. 5.

role of UNCITRAL-RCAP and other possible regional offices of UNCITRAL was underscored in that context;

(c) The need to achieve greater representation in the work of UNCITRAL of professional associations, arbitral institutions and other end users from underrepresented regions and groups of countries. Contributions of intended end users of UNCITRAL standards were considered valuable in defining UNCITRAL's work programme and in elaborating, promoting and monitoring the effectiveness of its standards;

(d) The need to increase the participation of States in development, implementation and application of treaties.

XVI. The thirty-fifth anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

325. The Commission had before it a note by the Secretariat entitled "Current trends in the field of international sale of goods law" (A/CN.9/849). The Commission recalled that at its forty-sixth session, in 2013, it had requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Sales Convention, to take place on a date after the forty-seventh Commission session.[73] In accordance with that request, which was reiterated at the Commission's forty-seventh session,[74] a panel discussion was organized by the Secretariat with participation of the following experts in the field of international sale of goods law: Mr. János Martonyi (moderator), Mr. Quentin Loh, Mr. Rui Manuel Gens de Moura Ramos, Ms. Ana Elizabeth Villalta Vizcarra, Mr. Liming Wang (panel members). A short summary of their presentations is contained in paragraphs 326 to 332 below.

326. It was recalled that a conference to take stock of progress in the promotion and implementation of the United Nations Sales Convention had taken place in Vienna on the occasion of the twenty-fifth anniversary of the Convention, in 2005. It was noted that the United Nations Sales Convention had continued to gather new State parties in the last decade, albeit a further increase in the pattern of adoptions could be desirable. At a general level, the contribution of the United Nations Sales Convention to upholding contractual freedom, which is its underpinning principle, was stressed.

327. It was further noted that in the last years a trend relating to the review and withdrawal of declarations had emerged. In that respect, the imminent withdrawal of the declarations lodged by Hungary upon ratification of the United Nations Sales Convention was announced and welcomed by the Commission. It was explained that such withdrawal would simplify the application of the Convention and further facilitate cross-border trade, and that the written form requirement for contracts for the international sale of goods was a legacy from the past. Similar considerations were expressed with respect to the withdrawal of the written form declaration by

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[73] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 315.

[74] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 255 (a).

China in 2013 that, it was explained, aligned the United Nations Sales Convention with the principle of freedom of form already adopted in domestic law.

328. The desirability of coordinating the preparation of treaties and other texts on international sales law at the global and regional level was stressed. Likewise, it was added, coordination should occur in the promotion of the adoption and uniform interpretation of those texts. Relevant texts included those dealing with private international law issues, such as, for instance, the Inter-American Convention on the Law Applicable to International Contracts, 1994, as well as those prepared by non-governmental organizations.

329. It was widely recognized that the United Nations Sales Convention had been the model for a number of legislative texts at the regional and national level. Nevertheless, it was noted, the United Nations Sales Convention remained the only global text of legislative nature and, as such, deserved special attention. It was added that further work might be possible in some areas on which consensus could not be achieved at the time of the conclusion of the United Nations Sales Convention, but which were dealt with in subsequent uniform texts such as the Unidroit Principles of International Commercial Contracts, and the Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference. Those areas included issues of validity, including battle of forms, and specific performance. Other topics deserving special interest in order to promote the effective implementation of the United Nations Sales Convention included the duty of uniform interpretation and references to foreign cases in court decisions, and the application of the Convention by virtue of its article 1(1)(b) or through the choice of the parties to the contract for international sale of goods. Yet another topic was the application of the United Nations Sales Convention as *lex mercatoria*, i.e. as reflecting the prevalent position in international trade law, in particular, in arbitral proceedings and by specialized judicial branches.

330. With respect to national enactments of the United Nations Sales Convention, the example was provided of the influence of the Convention on the Civil Code of Hungary of 2013, which took inspiration from the Convention with respect to liability standards for non-performance or partial performance, determination of the amount of damages, and the notion of foreseeability.

331. China was referred to as another example of jurisdiction where the United Nations Sales Convention had greatly influenced national contract law. It was explained that the transposition of substantive rules from the Convention into domestic law was based on a number of important factors, including that the United Nations Sales Convention offered the most effective rules from both the common law and the civil law legal systems, expressed through a common uniform terminology, and that its rules were deemed particularly supportive of a market economy. Examples were provided with respect to simplification of the system of remedies for non-performance and partial performance, including the notion of fundamental breach. It was further noted that the United Nations Sales Convention was particularly suitable as a model for national law since it compiled provisions that might otherwise be scattered in different texts (e.g., general part on contract law, special part on sales law, evidence rules).

332. Reference was made to the desirability of taking into account the developments in legal thinking and business practice since the adoption of the

United Nations Sales Convention, in 1980. The importance of enabling the use of new technologies was stressed. In that respect, it was said that the adoption of the Electronic Communications Convention would effectively update and complete the United Nations Sales Convention with provisions specifically designed for the use of electronic means.

333. The Commission expressed particular appreciation for the presentations of the experts and requested the Secretariat to take relevant initiatives to ensure that those presentations be published. Broad support was expressed for increasing, within available resources, the number of promotional and capacity-building activities aimed at supporting adoption and effective implementation of the United Nations Sales Convention. For instance, the possibility of studying in depth mechanisms to facilitate the uniform interpretation of the United Nations Sales Convention was mentioned. Another suggestion related to preparing a quantitative analysis of the benefits arising from the adoption of the Convention. Yet another suggestion pertained to the consequences of recommending opting out of the application of the Convention without full analysis of the consequences of such choice, with particular regard to informing providers of legal services of their possible professional liability. States were invited to further contribute suggestions on the form and scope of those activities. However, the view was expressed that following up on the United Nations Sales Convention legislative work would be untimely given that it remained to be demonstrated whether such work was useful or desirable.

334. The Commission took note of the fact that some of the activities scheduled to celebrate the thirty-fifth anniversary of the United Nations Sales Convention had yet to take place, and asked the Secretariat to report on those activities at its forty-ninth session. Noting that the matter of sales of goods law had not been dealt with in a working group for about three decades, and that therefore a regular forum for the exchange of information relating to the promotion and implementation of the United Nations Sales Convention was not readily available in UNCITRAL, the Commission asked the Secretariat to report periodically on promotional and capacity-building activities aimed at supporting the Convention implementation, with a view to seeking strategic guidance on those activities.

XVII. Work Programme of the Commission

335. The Commission recalled its agreement to reserve time for discussion of the Commission's overall work programme as a separate topic at each Commission session, as a tool to facilitate effective planning of its activities.[75]

336. The Commission heard a summary of the documents prepared to assist its discussions on this topic (A/CN.9/841, further documents referred to therein and proposals submitted thereafter). It noted that these documents addressed UNCITRAL's main activities, i.e. legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (collectively referred to as "support activities").

[75] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

337. The Commission took note of the progress of its Working Groups and regarding support activities reported earlier in the session (see chapters III to XVI of this report).

A. Legislative development

338. As regards the tabular presentation of future legislative activity (table 2 in document A/CN.9/841), the Commission decided as follows:

1. MSMEs

339. In relation to possible future work on MSMEs as set out in table 2, paragraph 13 of document A/CN.9/841, the view was expressed that it was hoped that UNCITRAL would be able to pursue work on financial inclusion, mobile payments, access to credit and alternative dispute resolution, among other topics.

340. It was agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation. The Commission again confirmed the mandate granted to Working Group I (see paras. 220 and 225 above).

2. Arbitration and conciliation

341. The Commission recalled the summary of its discussion on planned and future work in that area (see paras. 134-151 above). After discussion, it reaffirmed the mandate given to Working Group II to finalize the draft revised Notes, possibly utilizing parts of the sixty-fourth session of Working Group II (see para. 133 above). The Commission further confirmed its decision that work on the topic of enforcement of settlement agreements should be dealt with as a matter of priority by Working Group II beginning at its sixty-third session (see para. 142 above). It was further agreed that the topic of concurrent proceedings should remain on the agenda of the Commission as an item for future work, and the Commission reaffirmed its request to the Secretariat to explore the topic further (see para. 147 above). With respect to work on a code of ethics/conduct for arbitrators, the Commission reiterated its interest on that topic and reaffirmed its request to the Secretariat to explore the topic further and to report back at a future session (see para. 151 above). It was further noted that work on concurrent proceedings as well as a code of ethics/conducts should be considered in the context of both commercial and investment arbitration.

3. Online dispute resolution (ODR)

342. The Commission recalled that it had decided to consider progress in Working Group III and any future legislative activity on this topic together (see para. 226 above). The Commission took note of the main issues arising from the two Working Group sessions held since its forty-seventh session in 2014, namely that a third proposal for ODR Rules before the Working Group (which envisaged a single set of Rules) had not yet led to consensus on the issue of whether binding pre-dispute agreements to arbitrate concluded with consumers were to be given effect under the Rules. There remained fundamental differences on this question between States, despite the Working Group's strenuous efforts to broker consensus. Some States had

considered that the Commission should consider terminating the mandate of the Working Group in consequence, but others had expressed the view that the Working Group should continue with its efforts to find a consensus based on the third proposal. The Commission also heard that intersessional consultations since the Working Group's thirty-first session had not resulted in further progress.

343. The Commission heard a proposal from the delegation of Israel (A/CN.9/857), suggesting that UNCITRAL could develop a non-binding instrument for use by ODR providers and neutrals, whose aim would be to assist and support ODR practitioners. Such an instrument, it was said, would be in line with the existing mandate of the Working Group and could address various agreed-upon issues with respect to the general functioning of ODR providers and to case management. The title of the instrument, it was noted, did not need to be specified at this point. This approach, it was added, could enhance the reliability, impartiality and efficiency of ODR proceedings to encourage their use in high-volume, low-value, cross-border online commercial transactions. The instrument could build upon the significant progress made by the Working Group so far, without the need to address the complex issues regarding binding pre-dispute arbitration for consumers noted above.

344. It was also suggested that the Secretariat could prepare a draft for the non-binding instrument on the basis of the previous deliberations of the Working Group and in consultation with leading experts. In this context, issues not previously discussed but identified as relevant for such an instrument could then be addressed by the Working Group. It was also suggested that the Working Group could discuss a draft at its next two sessions. The proponent therefore stated that it did not support the suggestion that the Working Group's mandate should be terminated.

345. In response, it was observed that the lack of progress in the Working Group on the fundamental issue described above was such that it would not be appropriate for the work on ODR to continue, that the scarce resources of UNCITRAL should be deployed elsewhere, and accordingly that the mandate should indeed be terminated.

346. Another view was that the mandate itself should be construed more broadly, as its original formulation permitted: as recorded in the report of the Working Group on the work of its thirty-first session (A/CN.9/833, para. 3), the mandate referred to a "range of means ... including arbitration" for ODR, and did not limit the form of the text to the Rules. It was further observed that the mandate included both business to business (B2B) and (business to consumer (B2C) transactions. It was conceded, however, that the precise scope of the mandate might require further elaboration, in that there were different views on the interpretation of "ODR", notably on whether the concept included online arbitration, and online mediation and conciliation. The mandate had been granted, it was recalled, on the basis that there was existing practice in need of harmonization. As the Working Group took up its mandate, it had become clear that there were differences about the recognition of pre-dispute agreements to arbitrate in the consumer context, which had led to the preparation of two tracks of the Rules to reflect the different positions. That approach had ultimately yielded to the third proposal, which itself was subject to several interpretations reflecting this very disagreement among delegations. It was observed, in this regard, that this third proposal remained before the Working Group

and that terminating the mandate of the Working Group would therefore be inappropriate and discourteous to its proponents.

347. Support was expressed for continuing the mandate of the Working Group but for changing its focus to produce a non-binding text (whose nature could remain flexible at this stage, though suggestions for "instructions", "guidelines" and "notes" were made). In this regard, it was emphasized that the Working Group had already achieved consensus on many issues for an ODR procedure, reflecting substantive and significant progress, and it was suggested that the fundamental disagreement noted above could be resolved.

348. A further proposal was submitted by Colombia, Honduras and the United States (A/CN.9/858). It was explained that the proposal envisaged a non-binding descriptive instrument, of a technical and explanatory nature reflecting elements of an ODR process, which would address a range of technical issues while avoiding those issues that had proved irreconcilable in the Working Group. In this regard, the proposed text would not favour any particular system, would reflect the progress to date in the Working Group, and thus reflected an approach similar to that of the proposal from Israel. It was emphasized that the aim was to offer a source of guidance in this critical area of dispute resolution.

349. It was added that there would be a need to impose a time limit for the work envisaged, which was suggested to be no more than one year or two Working Group sessions.

350. Support for both the proposal and for setting this time frame was expressed. In addition, the importance of consumer protection and consequently of including B2C transactions in the scope of a future text were underscored.

351. In addition, the various compromise proposals that had been placed before the Working Group were recalled,[76] upon which consensus had not proved possible. In this regard, and in order to avoid reaching an impasse similar to that previously encountered in the Working Group, it was suggested that the Commission should provide a precise mandate to the Working Group for the non-binding text proposed, which would also be necessary to give practical effect to the proposed limited time frame. Recognizing the significant work that had been devoted to the earlier proposals, it was suggested that the Working Group be given an open mandate.

352. It was agreed that any future text should build upon the progress on the third proposal and other proposals. The Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

[76] That is, those set out in document A/CN.9/WG.III/121 and in paragraph 142 and paragraphs following it in the report of the Working Group on the work of its thirty-first session (A/CN.9/833).

353. On a practical level, it was noted that the proposed date for the autumn 2015 session of Working Group III would not be commensurate with the degree of preparation that would be necessary. Difficulties in finding further dates for the autumn session were noted, and the Secretariat was requested to find dates in December if possible. An alternative suggestion was that the Working Group could meet only in the spring of 2016, with preparatory work being undertaken using virtual meetings and other online tools. It was also emphasized that the participants in the Working Group would need to prepare for the sessions well in advance, so that the working papers would need to be circulated in good time. The Commission agreed to revert to this question when setting the dates for the Working Group sessions for the forthcoming year (see para. 385 (c) below regarding the agreed dates for the autumn 2015 session of the Working Group).

4. Electronic commerce

354. The Commission heard illustrations of the three proposals relating to future work on electronic commerce submitted for its attention, namely on legal issues related to identity management and trust services (A/CN.9/854), on contractual issues in the provision of cloud computing services (A/CN.9/856) and on issues relating to mobile commerce and payments effected with mobile devices (A/CN.9/WG.IV/WP.133).

355. Broad interregional consensus was expressed on the desirability of conducting work on identity management and trust services. The importance of the topic for other suggested future work in the field of electronic commerce as well as its relevance for the current mandate of Working Group IV and for existing UNCITRAL texts was stressed. It was indicated that the scope of that work should be better defined, for instance by specifying that it could deal with the use of public trust frameworks for commercial relations, but should not extend to matters clearly outside UNCITRAL's mandate. In order to define the methodology of work, those member States that initiated this proposal expressed their availability to support the Secretariat, specifically by organizing a colloquium on this issue.

356. Broad consensus was also expressed for undertaking work in the field of cloud computing. It was suggested that that work could take the form of guidance material or as otherwise appropriate, and should cover the perspectives of all parties involved, i.e. service providers, users and concerned third parties. It was further suggested that private international law aspects should be discussed, possibly in cooperation with the Hague Conference on Private International Law.

357. Support was also expressed for undertaking work on the legal aspects of the use of mobile devices, especially for its potential relevance for developing countries. However, it was added, caution should be used in order to avoid touching upon regulatory matters. It was further indicated that, while matters relating to payments with electronic means had great relevance for international trade and it might be particularly desirable to update existing UNCITRAL texts in that field, any work proposal required further illustration given the complexity of the subject.

358. The Commission accordingly instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the current

work on electronic transferable records. The Commission also asked the Secretariat to share the result of that preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session. If the current work of the Working Group was concluded prior to the next session of the Commission, the Working Group could take up the subjects mentioned above.

5. Insolvency

359. The Commission considered the issue raised in paragraph 15 (c) of document A/CN.9/841 on the insolvency treatment of financial contracts and noted the update provided by the Secretariat with respect to the work of international organizations in paragraphs 1-5 of document A/CN.9/851. After discussion, the Commission agreed that Working Group V should focus on the topics currently before it (as noted in paras. 232-237 above) and that work on updating the chapter of the UNCITRAL Legislative Guide on Insolvency Law[77] relating to the insolvency treatment of financial contracts should not be taken up at this time.

360. The Commission also noted the information provided to it in document A/CN.9/851 with respect to sovereign debt restructuring and agreed that the Secretariat should not be requested to monitor international developments on that topic.

6. Security interests

361. It was noted that the Commission would be taking up the draft Model Law, with a view to approval of parts thereof, during the third week of the session (see paras. 166-214 above). It was noted that the Working Group had undertaken its work on the elaboration of a model law mindful of the benefits of an accompanying guide to enactment that would set out background and explanatory information for the benefit of enacting States. The Commission agreed that it would confirm whether the Working Group should indeed prepare such a guide to enactment for submission to the Commission session in 2016, together with the final draft of a model law on secured transactions, later in the session. The Commission also noted that it would consider other possible future topics in the field of security interests (a contractual guide on secured transactions in particular for small- and medium-sized enterprises and enterprises in developing countries, and a uniform law text on intellectual property licensing), at a future time and on the basis of more detailed information from the Secretariat following meetings of experts and/or one or more colloquia. (For the decisions of the Commission on those matters, see paras. 215-217 above.)

7. Public procurement and infrastructure development

362. The Commission took note of the proposals set out in document A/CN.9/850. As regards the proposal for future work on the topic of suspension and debarment in public procurement, the importance of the topic was agreed. Support was expressed for the proposal that the Secretariat should engage in preparatory work towards the possible development of a legislative text in this area. In this regard, the Commission heard that the issues raised had been the subject of discussion among

[77] United Nations publication, Sales No. E.05.V.10.

European Union member States and other States, and that there were indeed significant differences in practice. Consequently, it was said, this was a topic upon which a harmonized UNCITRAL text would support the effective implementation and use of the UNCITRAL Model Law on Public Procurement.[78] On the other hand, some concern was expressed that a legislative text might not be an appropriate solution to the issues identified, and that the demand for such a text from States, rather than from within the donor community, should be explored. The Secretariat was instructed to report to the Commission at its 2016 session on the results of its exploratory work on the question.

363. As regards public-private partnerships (PPPs), support was expressed for the proposal as set out in document A/CN.9/850, and the importance of the topic to developing countries in particular was emphasized. The suggestion was made that one or more colloquia should be held, so as to ensure an inclusive and multilingual approach to developing a legislative text on PPPs, and to ensure that there would be sufficient time available to States to consider the proposed provisions and guidance before a text were presented to the Commission for its consideration and possible adoption. The view was expressed, on the other hand, that in light of the time that was required for the development of the existing UNCITRAL texts in the area of privately financed infrastructure projects[79] and the efforts of the Secretariat in recent years, there was a risk that the project would turn into a lengthy one, and might eventually involve working group resources. For that reason, it was said that the Commission should not take up the proposal at this time. A further view was that the resource implications, which would not at this stage be extensive either for the Secretariat or for the member States, were appropriate given the importance of the topic. The opinion that the topic was not amenable to harmonization, which had been expressed at the previous Commission session, was repeated. It was decided, in light of the other decisions implicating UNCITRAL's resources made earlier at the session, that the topic would be kept on the Commission's agenda, that the Secretariat would continue to follow the topic to advance preparations should it eventually be taken up, and that the Secretariat would report further to the Commission in 2016.

364. In light of confirmation of the mandates of the Working Groups and the activities assigned for legislative development as set out in paragraphs 339-361 above, the Commission agreed that there were no further resource issues to be addressed on that topic.

B. Support activities

365. The Commission expressed its appreciation for the support activities described in documents A/CN.9/837, A/CN.9/838, A/CN.9/839, A/CN.9/840, A/CN.9/842, A/CN.9/843 and A/CN.9/845, as considered earlier in this session (see chapters X to XV of this report), and requested the Secretariat to continue with those activities to the extent that its resources permitted.

[78] General Assembly resolution 66/95, annex.

[79] The *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000) and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

C. Commemoration of the fiftieth anniversary of the establishment of UNCITRAL

366. The Commission heard of the successful conclusion of the 1992 UNCITRAL Congress,[80] which had included both retrospective and prospective elements, and expressed its agreement with the suggestion that a third UNCITRAL congress should be held to commemorate UNCITRAL's fiftieth anniversary. The Secretariat was requested to undertake preparatory work towards the organization of such a congress, as suggested in paragraph 33 of the note by the Secretariat (A/CN.9/841), and to make proposals to the Commission at its forty-ninth session in 2016 on the basis that the Congress would take place in 2017. It was suggested that the event should be designed so as to promote the profile of UNCITRAL and enhance public awareness of UNCITRAL's successful activities during its first fifty years of operation.

XVIII. Relevant General Assembly resolutions

367. The Commission took note of the following two General Assembly resolutions adopted on the recommendation of the Sixth Committee: resolution 69/115 on the report of the United Nations Commission on International Trade Law on the work of its forty-seventh session; and resolution 69/116 on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

XIX. Other business

A. Entitlement to summary records

368. The Commission recalled that at its forty-fifth session, in 2012, it decided, while not relinquishing its entitlement to summary records under General Assembly resolution 49/221, to request that digital recordings continue to be provided at its forty-sixth and forty-seventh sessions, in 2013 and 2014, on a trial basis, in addition to summary records, as was done for the forty-fifth session.[81] At its forty-seventh session, in 2014, the Commission assessed the experience of using digital recordings and on the basis of that assessment decided to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records for at least one more year. It was noted that at its next session the Commission would again assess its experience with the use of digital recordings. It was understood that until it was ascertained that no obstacles existed to making the transition from summary records to digital recordings, summary records would have to be provided to the Commission.[82]

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[80] *Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992* (United Nations publication, Sales No. E.94.V.14).

[81] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 249.

[82] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 271-276.

369. At its forty-eighth session, the Commission heard an oral report of the Secretariat on the experience with the use of UNCITRAL's digital recordings and developments as regards General Assembly resolution 67/237, paragraph 26, stating that "the further expansion of [transition to digital recordings of meetings in the six official languages of the Organization as a cost-saving measure] would require consideration, including of its legal, financial and human resources implications, by the General Assembly and full compliance with the relevant resolutions of the Assembly".

370. The Commission noted that the wording found in General Assembly resolution 67/237 was repeated in General Assembly resolution 69/250, paragraph 105, with the request to the Secretary-General to report on the use of digital recordings to the Assembly at its seventieth session. In light of this resolution, the Commission decided again to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records for at least one more year. It was noted that at its next session the Commission would again assess its experience with the use of digital recordings.

B. Internship programme

371. The Commission recalled the considerations taken by its secretariat in selecting candidates for internship. It also recalled the procedure for selecting interns that was put in place from 1 July 2013, changes introduced on 13 January 2014 in eligibility requirements for internship with the United Nations and the reported positive implications thereof on the pool of eligible and qualified candidates for internship from under-represented countries, regions and language groups.[83]

372. The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-seventh session, in July 2014, thirteen new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most interns were coming from developing countries and countries in transition, among them one coming from a least developed country and one coming from a small island developing country.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

373. The Commission recalled that at its fortieth session, in 2007,[84] it had been informed of the programme budget for the biennium 2008-2009, which listed among the expected accomplishments of the Secretariat "facilitating the work of UNCITRAL". The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a

[83] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 344; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278.

[84] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.

rating on a scale ranging from 1 to 5 (5 being the highest rating).[85] At that session, the Commission had agreed to provide feedback to the Secretariat.

374. From the fortieth session until the forty-fifth session of the Commission, in 2012, the feedback was provided by States attending the annual sessions of UNCITRAL in response to the questionnaire circulated by the Secretariat by the end of the session. That practice had changed since the Commission's forty-fifth session, in 2012, partly because of the need to solicit more responses: instead of an in-session questionnaire, the Secretariat started circulating to all States closer to the start of an annual session of the Commission a note verbale with the request to indicate, by filling in the evaluation form enclosed to the note verbale, their level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat during a given session. As regards the forty-eighth session of UNCITRAL such a note verbale was circulated to all Member States of the United Nations on 3 June 2015 and the period covered was indicated from the start of the forty-seventh session of UNCITRAL (7 July 2014).

375. The Commission was informed that the request had elicited seventeen responses and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained high (twelve States respondents gave 5 out of 5 and five States respondents gave 4 out of 5). The Commission heard that States in their statements to the Sixth Committee of the General Assembly on the report of the Commission often included their views on the work of the UNCITRAL secretariat in servicing the Commission. Such statements did not lend themselves to the easy quantitative assessment.

376. The Commission took note of the concern that the level of responses to the request for evaluation remained low and that it was essential to receive from more States the feedback about the UNCITRAL secretariat's performance for a more objective evaluation of the role of the Secretariat. This was required for budgetary and other purposes. The Commission expressed appreciation to the Secretariat for its work in servicing UNCITRAL.

D. Measures to achieve the optimum utilization by UNCITRAL of conference servicing resources

377. The Commission was informed about a letter of 22 April 2015 from the Chair of the Committee on Conferences addressed to the Chair of the forty-seventh session of UNCITRAL. The letter referred to underutilization of conference services by UNCITRAL in 2012-2014 and suggested measures to achieve the optimum utilization of conference servicing resources, in particular by:

(a) Reducing cancellation of meetings by programming only the number of meetings anticipated based on past patterns;

(b) Considering additional items in the programme if time remains at the end of a scheduled meeting;

(c) Reducing the meeting blocks to two hours;

[85] A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

(d) Informing the Meetings Management Section of anticipated late starts and early endings at least the day before to free up unused portions of interpretation services.

378. The Commission, while acknowledging that there was room for improvement, in particular in the punctual start of meetings, was of the view that the nature of the work of UNCITRAL as an expert legal body did not make it possible to plan its meetings precisely. The number, length and content of statements, the level of controversy that they might raise and the time needed to reach compromise could not be predicted. In addition, technical terms involved often complicated their interpretation and understanding in the six languages of the United Nations, which occasionally called for a longer dialogue and informal consultations. The view was therefore expressed that the specialized nature of UNCITRAL and the highly technical and complex field that it dealt with needed to be taken into account. This made UNCITRAL distinct from other United Nations bodies operating on a more predictable pattern.

379. Nevertheless the Commission agreed that the concerns expressed on behalf of the Committee on Conferences were to be seriously considered and taken into account and the Commission should remain vigilant. A question was raised whether utilization by the Commission and its working groups of conference time for informal consultations could negatively affect UNCITRAL's record on utilization of conference services. In response, the Commission was generally of the view that the indispensable role of informal consultations in reaching compromises and consensus should be emphasized. The Secretariat was requested to ensure that their use at any point in time, before, during or after more formal discussion, were indeed considered and recorded as legitimate use of the allocated conference time.

380. Specific reference was made to the high number of cancelled meetings during the Commission session in 2014 and late starts and early ends of meetings during the Commission session in 2013. While admitting that the number of cancelled meetings in 2014 was indeed an anomaly and the result of unexpectedly productive deliberations, the view was expressed that the Commission and its working groups should not find themselves in the situation when they had to continue deliberations for the sake of fully utilizing conference services. Qualitative aspects of UNCITRAL's work should never be overlooked in efforts to improve statistics on utilization of conference services.

381. The UNCITRAL secretariat was commended for its excellent job in carefully planning the duration of Commission sessions, scheduling meetings and distributing agenda items throughout any given session taking into account an expected workload.

382. After discussion, the Commission agreed to transmit to the Committee on Conferences the following message:

> "The Commission took note of concerns about underutilization of conference services by UNCITRAL in 2012-2014 and measures to improve the situation, contained in the letter of 22 April 2015 from the Chair of the Committee on Conferences to the Chair of the forty-seventh session of UNCITRAL.
>
> The Commission appreciates the high-quality conference services provided to the Commission and was committed to utilizing them efficiently. It supports efforts across the United Nations to that end. It takes note of the suggested measures noting however that its mandate, nature and methods of work would not always permit implementing them."

XX. Date and place of future meetings

383. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[86]

A. Forty-ninth session of the Commission

384. In the light of the considerations set out above, the Commission approved the holding of its forty-ninth session in New York from 27 June to 15 July 2016 (the United Nations Headquarters is closed on 4 and 7 July 2016). The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

B. Sessions of working groups

1. Sessions of working groups between the forty-eighth and forty-ninth sessions of the Commission

385. In the light of the considerations set out above, the Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (MSMEs) would hold its twenty-fifth session in Vienna from 19 to 23 October 2015 and the twenty-sixth session in New York from 4 to 8 April 2016;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-third session in Vienna from 7 to 11 September 2015 and its sixty-fourth session in New York from 1 to 5 February 2016;

(c) Working Group III (Online Dispute Resolution) would hold its thirty-second session in Vienna from 30 November to 4 December 2015 and its thirty-third session in New York from 29 February to 4 March 2016;

[86] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(d) Working Group IV (Electronic Commerce) would hold its fifty-second session in Vienna from 9 to 13 November 2015 and its fifty-third session in New York from 9 to 13 May 2016;

(e) Working Group V (Insolvency Law) would hold its forty-eighth session in Vienna from 14 to 18 December 2015 and its forty-ninth session in New York from 2 to 6 May 2016;

(f) Working Group VI (Security Interests) would hold its twenty-eighth session in Vienna from 12 to 16 October 2015 and its twenty-ninth session in New York from 8 to 12 February 2016.

2. Sessions of working groups in 2016 after the forty-ninth session of the Commission

386. The Commission noted that tentative arrangements had been made for working group meetings in 2016 after its forty-ninth session, subject to the approval by the Commission at that session:

(a) Working Group I (MSMEs) would hold its twenty-seventh session in Vienna from 3 to 7 October 2016;

(b) Working Group II (Arbitration and Conciliation) would hold its sixty-fifth session in Vienna from 5 to 9 September 2016;

(c) Working Group III would hold its thirty-fourth session in Vienna from 19 to 23 September 2016;

(d) Working Group IV (Electronic Commerce) would hold its fifty-fourth session in Vienna from 31 October to 4 November 2016;

(e) Working Group V (Insolvency Law) would hold its fiftieth session in Vienna from 12 to 16 December 2016;

(f) Working Group VI (Security Interests) would hold its thirtieth session in Vienna from 5 to 9 December 2016.

Annex

List of documents before the Commission at its forty-eighth session

Symbol	*Title or description*
A/CN.9/824	Provisional agenda, annotations thereto and scheduling of meetings of the forty-eighth session
A/CN.9/825	Report of Working Group I (MSMEs) on the work of its twenty-third session
A/CN.9/826	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session
A/CN.9/827	Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session
A/CN.9/828	Report of Working Group IV (Electronic Commerce) on the work of its fiftieth session
A/CN.9/829	Report of Working Group V (Insolvency Law) on the work of its forty-sixth session
A/CN.9/830	Report of Working Group VI (Security Interests) on the work of its twenty-sixth session
A/CN.9/831	Report of Working Group I (MSMEs) on the work of its twenty-fourth session
A/CN.9/832	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session
A/CN.9/833	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session
A/CN.9/834	Report of Working Group IV (Electronic Commerce) on the work of is fifty-first session
A/CN.9/835	Report of Working Group V (Insolvency Law) on the work of its forty-seventh session
A/CN.9/836	Report of Working Group VI (Security Interests) on the work of its twenty-seventh session
A/CN.9/837	Technical cooperation and assistance
A/CN.9/838	Coordination activities
A/CN.9/839	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/840	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/841	Planned and possible future work
A/CN.9/842	Activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/843	Status of conventions and model laws
A/CN.9/844	Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings
A/CN.9/845	Technical assistance to law reform
A/CN.9/846 and Adds.1-5	Settlement of commercial disputes — Enforcement of settlement agreements resulting from international commercial conciliation/mediation — Compilation of comments by Governments

Symbol	*Title or description*
A/CN.9/847	Principles on Choice of Law in International Commercial Contracts
A/CN.9/848	Concurrent proceedings in investment arbitration
A/CN.9/849	Current trends in the field of international sale of goods law
A/CN.9/850	Planned and possible future work in procurement and infrastructure development
A/CN.9/851	Insolvency Law: treatment of financial contracts and netting, sovereign debt restructuring
A/CN.9/852	Draft Model Law on Secured Transactions (Chapter IV)
A/CN.9/853	Draft Model Law on Secured Transactions (Chapter VIII-IX)
A/CN.9/854	Possible future work in the area of electronic commerce — legal issues related to identity management and trust services
A/CN.9/855	Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators
A/CN.9/856	Possible future work in the area of electronic commerce — Contractual issues in the provision of cloud computing services — Proposal by Canada
A/CN.9/857	Possible future work in the area of online dispute resolution — Proposal by Israel
A/CN.9/858	Possible future work in the area of online dispute resolution — Proposal by Colombia, Honduras and the United States